IN THE MISSOURI SUPREME COURT

No. SC 83912

CITY OF SPRINGFIELD, MISSOURI
Respondent

v.

THOMPSON SALES COMPANY, et al.
Appellants

Appeal from the Circuit Court of Greene County, Missouri
The Honorable Calvin R. Holden Presiding

SUBSTITUTE BRIEF OF RESPONDENT CITY OF SPRINGFIELD, MISSOURI

Oral Argument Requested

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ATTORNEYS FOR RESPONDENT
CITY OF SPRINGFIELD, MISSOURI

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JURISDICTIONAL STATEMENT

City of Springfield, Missouri adopts and incorporates herein by reference the jurisdictional statement set forth in Appellants' brief.

STATEMENT OF FACTS

Because of the limited issues raised by Appellants (hereinafter the "Landowners") in their Points Relied Upon, it is not necessary to provide this Court with a complete statement of the facts from the trial, but rather to provide only those facts which address Landowners' contentions and those facts which support the judgment when viewed most favorably. Respondent (hereinafter the "City") believes that Landowners' statement of facts is not within the spirit and intent of Rule 84.04(c), as it contains references to facts that were not before the Court during the trial (specifically the commissioners' award), contains argument and references to issues not germane to those raised by Landowners in their brief, and does not fully set forth the facts which this Court needs to fairly and accurately determine whether the Court abused its discretion relating to the points presented by Landowners. For those reasons, the City elects to set forth the following statement of facts:

I. PROPERTY IDENTIFICATION

The property at issue in this case consisted of four parcels identified at trial as Parcels 2A, 2B, 2C and 2D, which was used by Landowners as a car sales facility. The descriptions of those parcels and their respective ownership is irrelevant in this appeal, and all the parcels are collectively referred to as the "property". This condemnation

action resulted in the total taking of the property. The new car dealership[1] operated by the Landowners was not included in the taking and at the time of trial the dealership was preparing to move into a new facility built in the south part of Springfield. (Tr. 518).

The property was located generally on St. Louis and Trafficway in downtown Springfield. It is divided by Trafficway, which is a five lane street. Trial Exhibit 8A is attached hereto as Appendix A, (p. A001) to assist this Court in understanding the location and layout of the property.

II. MOTION IN LIMINE ISSUES

Prior to trial, the City filed its First Motion in Limine seeking to exclude any testimony about or mention of the commissioners' award or the negotiations to acquire the subject property. (LF 60-61). The trial court sustained the City's motion. (SLF 009). Landowners filed their First Motion in Limine seeking to exclude the opinions of Ben Hicks. (LF 65). That request was overruled by the Court. (SLF 009). During trial, Landowners twice objected to the presentation of Mr. Hicks' videotaped testimony on the ground that the jury could not ask questions of Mr. Hicks – once at the beginning of the trial during the discussion about juror questions and once just before the video was shown to the jury. (Tr. 217, 1097-1100). When this objection was first raised by Landowners, the trial court indicated that in its opinion the inability for the jury to ask questions of Mr. Hicks would be more of a detriment to the City, who was presenting this witness, because juries want to gain as much information as they can to make a decision. (Tr. 217-219).

[1] Sometimes referred to as the "dealership" or "Thompsons".

III. VOIR DIRE EXAMINATION

During voir dire, the City's counsel began to explain generally how the condemnation process works. After the City's counsel mentioned the word "commissioners" during his explanation, the Landowners' counsel objected. (Tr. 99-100).

At the side bar, the trial court indicated it would sustain Landowners' objection. (Tr. 102). The trial court further indicated it would not allow the City's counsel to finish his statement to inform the veniremen about the process (Tr. 107). The trial court denied Landowners' motion for mistrial. (Tr. 104). The proceedings then returned to open court and the City's counsel continued the voir dire examination along another line of questioning. (Tr. 107).

Later on during the City's voir dire, its counsel began inquiry designed to insure that none of the veniremen held any preconceived opinions that the damage award would increase their taxes, stating:

> "Now there may be somebody on the panel that feels like well, look, if I award Thompsons this money, my taxes might go up as a –" (Tr. 124-125).

That statement was again interrupted by the objection of Landowners' counsel who again asked for a mistrial. A side bar was held and the trial court sustained Landowners' objection, and took the motion for mistrial under advisement. (Tr. 129). The trial court asked counsel for Landowners if they wanted the Court to say anything to the jury other than that it had sustained the objection and that it was instructing City's counsel to continue with another line of questions. No withdrawal, reprimand, rebuke, admonition

or other relief was requested by Landowners' counsel at that point except a mistrial. (Tr. 130). The proceedings returned to open court with the trial court stating that it would sustain the objection and that City's counsel could proceed on with another line of questioning. (Tr. 131).

IV. JUROR QUESTIONS

Upon the completion of voir dire, the trial judge informed counsel for both parties that he would allow jurors to take notes and would also permit jurors to tender questions for witnesses.[2] The judge also advised counsel that the jury would be instructed about the procedure for asking such written questions through the use of a modified MAI 2.01. Both parties initially expressed an objection to allowing jury questioning[3]. (Tr. 213-219).

At the commencement of the trial, the trial court read to the jury a modified MAI 2.01 as Instruction No. 1 without objection at that time by Landowners' counsel. (Tr. 249). That instruction was modified to reverse the parties as is necessary in a condemnation action, contained the MAI approved addition instructing the jury members that they would be allowed to take notes, and further contained additional language regarding the process the jurors could follow should they desire to ask other questions for

[2] In fact, as the affidavit of Judge Holden indicates, notice to the parties of the potential for jury questioning came much earlier (See Affidavit attached hereto as Appendix B, p. A002).

[3] The City's counsel expressed concerns about the jury entering into prohibited areas, but never found a reason to express that complaint, or during the trial and made no further objections to the process (Tr. 214).

the witnesses. A copy of the modified MAI 2.01 in its entirety is attached hereto as Appendix C (pps. A003-A005). The pertinent language added by the trial court is set forth below:

> You will be given the opportunity to ask written questions of any of the witnesses called to testify in this case. You are not encouraged to ask large numbers of questions because that is the primary responsibility of counsel. Questions may be asked only in the following manner.
>
> After all lawyers have finished asking questions of a witness then you will be allowed to ask questions. Each of you will be requested to write a question or write something on a sheet of paper after each witness. You will then pass all sheets to the bailiff.
>
> The Court and lawyers will then review the questions and I will determine if your question is legally proper. The attorneys may then ask the question of the witness. No inference is to be drawn by which attorney asks the question of the witness. No adverse inference should be drawn if the question is not allowed by the Court or if the question is not asked by one of the attorneys.

Once it was determined which questions were proper, counsel for either side would then direct those questions to the witness, and the attorneys were allowed to expand on that area of testimony, if they so desired. (Tr. 578).

Because Landowners have raised the issue of juror questions, the City will highlight selected portions of each witnesses' testimony and the handling of jury questions actually tendered for each witness.

V. WITNESSES-LANDOWNERS

1. George Thompson.

George Thompson is one of the principal owners of the property and the dealership. (Tr. 350-351). Mr. Thompson began working at the car dealership in 1970, and at that time, many of the other car dealerships were located downtown. (Tr. 419). Mr. Thompson testified that some of the automobile dealerships had subsequently moved to the south and east of Springfield and that his dealership was the only one that stayed downtown. (Tr. 421-422). He further testified that, but for this condemnation proceeding, he would never have planned to move the dealership from this location. (Tr. 353). Mr. Thompson has no special knowledge or expertise in commercial real estate valuation in Springfield or Greene County, (Tr. 444) and expressed his opinion of the value for the property to be $5,250,000. (Tr. 396).

At the end of Mr. George Thompson's examination, the written questions from the jury were reviewed by the Court and by counsel. A total of 15 questions were submitted

by jurors[4]. (2dSLF 028-037). Ultimately three of those questions were asked. (Tr. 460-465). The remainder of the questions submitted were not allowed by the trial court or were objected to by counsel. (Tr. 460-465). The questions from the jury which were ultimately asked were:

1. Why were the improvements made on two offices 1½ months before trial? (Tr. 466 and Ct. Ex. 6 - 2dSLF 033);

2. Did his value included the equipment? (Tr. 466 and Ct. Ex. 4 – 2dSLF 031); and

3. Why is he moving if the location on St. Louis Street is so great? (Tr. 467 and Ct. Ex. 2 - 2dSLF 029)?

No objection was raised by Landowners' counsel to these questions. Both counsel were instructed by the Court that they would be generally allowed to ask follow-up questions. (Tr. 465).

2. <u>Lynn Thompson.</u>

Lynn Thompson is another principal owner of the property and the dealership. (Tr. 471). Mr. Thompson testified that back in the early 1970s, all car dealerships were located downtown. (Tr. 541). He testified that their dealership is the only full-service

[4] The City has filed with this court a Second Supplemental Legal File containing certified copies of the actual jury questions tendered during the trial of this matter which were marked as Ct. Exs. 1-46. All future references thereto will be identified as "2dSLF ___". The proposed questions submitted by the jury as they related to Mr. George Thompson were marked as Ct. Exs. 1 through 10 (2dSLF 028-037).

Cadillac, Pontiac, GMC truck dealership in Springfield. (Tr. 552). Mr. Thompson also acknowledged that the property was divided by Trafficway and, on occasion, customers and employees were required to cross Trafficway, which could be dangerous. (Tr. 534-535). It was Mr. Thompson's opinion, however, that there was not a lot of traffic on Trafficway and he said that Landowners' counsel probably had the traffic count numbers. (Tr. 534).

Mr. Thompson provided testimony about the dealership's contractual relationship with GM (Tr. 487-488) and discussed a GM concept known as "Project 2000". (Tr. 490-491). When looking for a new location for the dealership, Mr. Thompson said that he looked at several five acre tracts. He was familiar with the "Montgomery" property which is a vacant car sales facility located approximately ten blocks away from the property. (Tr. 518-520).

Although he has no expertise in real estate appraisal (Tr. 504), Mr. Thompson gave his opinion that the property and attached equipment was worth $5,500,000. (Tr. 503).

At the end of Lynn Thompson's examination, juror questions were offered, and several were excluded (Tr. 566-570 and Ct. Exs. 11 through 19 – 2dSLF 038-046). Ultimately 6 questions from jury members were presented to him – five asked by Landowner's counsel and one asked by counsel for City. Those questions were:

1. What was the Landowners' relationship with General Motors? (Tr. 571 and Ct. Ex. 16 – 2dSLF 043);

2. If the Landowners sold the buildings, would the franchise also go with it? (Tr. 572 and Ct. Ex. 15 – 2dSLF 042);

3. Had there been any personal injuries or property damage as a result of people walking across Trafficway? (Tr. 573 and Ct. Ex. 14 – 2dSLF 041);

4. Could jurors see the GM Project 2000 letter? (Tr. 574 and Ct. Ex. 13 – 2dSLF 040);

5. If the Landowners were the only full-service dealer in Springfield, would they get similar business at the new location? (Tr. 575 and Ct. Ex. 12 – 2dSLF 039); and

6. What is the location of the Montgomery property? (Tr. 576 and Ct. Ex. 11 – 2dSLF 038)?

3. Walter Hall.

Mr. Hall was an expert hired by the Landowners. He provided testimony about the viability of the property for use by a car dealership and the equipment which normally stays with a car sales facility when it is sold. (Tr. 592). During Mr. Hall's visit to Springfield, he noticed dealerships were grouped in the South Campbell area in close proximity to each other. He found that the Landowners were the only dealership left downtown. (Tr. 632). Mr. Hall also testified about an outstanding bill for his deposition which had not been paid by the City. (Tr. 642-643).

After review by the trial judge and the attorneys, only 1 question out of 12 submitted by the jury was asked. (Tr. 644-652 and Ct. Exs. 20 through 26 – 2dSLF 047-053). The one question which concerned Mr. Hall's unpaid bill (Ct. Ex. 24 – 2dSLF 051)

was asked without objection, and Mr. Hall was allowed to respond that he had billed the City for time spent in preparation, travel and attendance at a deposition. (Tr. 653).

4. Roger Chantal.

Mr. Chantal appeared as an expert for the Landowners to value certain equipment at the property. (Tr. 661). Mr. Chantal prepared a list of the equipment ("Chantal list") which he valued at $329,000. (Tr. 688).

The trial court allowed one of the two questions offered by the jury to be asked. (Tr. 711-713 and Ct. Exs. 27and 28 – 2dSLF 54-55). Mr. Chantal was asked if the equipment shown on his list had either been purchased new or used at auctions by the Landowners (Ct. Ex. 28 – 2dSLF 055). Landowners' counsel asked the question without objection. (Tr. 713).

5. David Mathewson.

David Mathewson was one of Landowners' real estate appraisal experts. Mr. Mathewson is not a MAI certified appraiser. (Tr. 784). His appraisal of the property included three separate appraisal reports (Tr. 720) indicating a total value of $3,416,000, excluding equipment. (Tr. 783).

After review by the trial judge and the attorneys, seven of the questions offered by the jury were posed to Mr. Mathewson. (Tr. 863-865 and Ct. Exs. 29 through 32 – 2dSLF 56-57, 59, 61). All of those questions were asked by Landowners' counsel. Those questions were:

1. If another car dealer was buying the property, would they pay market price? (Tr. 866 and Ct. Ex. 31 – 2dSLF 059);

2. Is there a standard method for all appraisers? (Tr. 866-867 and Ct. Ex. 32 – 2dSLF 061);

3. For the cost approach, what was the depreciation value in dollar amount for each tract? (Tr. 867 and Ct. Ex. 30 – 2dSLF 057);

4. Is it standard practice to leave out a property currently on the market as a comparison property? (Tr. 868 and Ct. Ex. 30 – 2dSLF 057);

5. Why is the price per square foot different for the three tracts he valued? (Tr. 870 and Ct. Ex. 30 – 2dSLF 057);

6. Does the Behlman property[5] have machine shop and paint shop capabilities? (Tr. 870-871 and Ct. Ex. 30 – 2dSLF 057); and

7. What was the total combined valuation of the three properties as a whole? (Tr. 871 and Ct. Ex. 29 – 2dSLF 056).

Again, those questions were asked without objection. Counsel for the City was allowed to ask a follow up question about whether normally a buyer would pay any more than the listing price for a tract of property. (Tr. 871). There was no objection by Landowners' counsel to that questioning.

6. <u>William Davis.</u>

William Davis was the Landowners' other real estate appraisal expert. Mr. Davis was qualified as a MAI appraiser. (Tr. 876). In his opinion the value of the property (including the equipment) was $3,630,000. (Tr. 930, 935). He testified that Thompsons

[5] The Behlman property was one of his comparable sales used in formulating his opinion of value.

was the only Pontiac/Cadillac dealership in Springfield. (Tr. 943). He was also questioned about various traffic counts in Springfield. (Tr. 947).

Of the questions tendered by the jury, six were permitted to be asked[6]. (Tr. 1010-1014 and Ct. Exs. 31 through 36 – 2dSLF 58, 60, 62-65). Those questions reflected on Ct. Exs. 31, 33, 34 and 35 (2dSLF 58, 62-64) which were ultimately asked addressed the areas of 1) the comparable sales he used in preparing his appraisal; 2) the highest capitalization rates that can be used; and 3) the effect of a five lane road cutting through the property. (Tr. 1014-1020). Again, these questions were asked without objection from Landowners' counsel.

VI. WITNESSES – THE CITY

1. Leo Cologna.

Mr. Cologna appeared as a records custodian for the Missouri Department of Transportation. (Tr. 1052). At the trial, Mr. Cologna was a traffic operations engineer for MoDOT. (Tr. 1053). Two exhibits were offered through his testimony (Ptf. Exs. 48A and 48B), showing January, 2000 traffic counts collected at certain points on Missouri State Highways 65 and 60. (Tr. 1053). Both exhibits were admitted without objection. (Tr. 1054). The jury did not tender any questions for this witness.

2. Earl Newman.

Earl Newman is in charge of the City's traffic department. (Tr. 1026, 1028). He established the foundation for Ptf. Exs. 48 and 49 showing traffic counts within the City

[6] The Court accidentally duplicated the use of Ct. Exs. 31 and 32 when marking the proposed jury questions as exhibits.

of Springfield at several locations, including some near the property. (Tr. 1036). Those exhibits were qualified as business records of the City and were admitted without objection. (Tr. 1056-1058).

Three questions from the jurors were asked of Mr. Newman. (Tr. 1068-1069):

1. What was the last name of the person who had just testified (Leo Cologna)? (Tr. 1069 and Ct. Ex. 38 – 2dSLF 067);

2. Was a traffic count available for Hammons Parkway near St. Louis Street? (Tr. 1069-1070 and Ct. Ex. 37 – 2dSLF 066); and

3. If that count is available, what is it? (Tr. 1069-1070 and Ct. Ex. 37 – 2dSLF 066)

Landowners' counsel did not object to those questions. Counsel for the Landowners did ask follow-up questions about a traffic count near Hammons Parkway and St. Louis Street. (Tr. 1071).

3. <u>Kerry Noe.</u>

Mr. Noe was a paralegal for the City's attorneys. He testified about the preparation of maps showing the location of Springfield car dealerships during the years 1961, 1970, 1980, 1990 and 2000 as reflected in the phone directories for those particular years. (Tr. 1073, 1076-1078). The maps were marked as Ptf. Exs. 1A through 5A.

Upon completion of Mr. Noe's testimony, the trial court allowed the following questions submitted by the jury to be asked. (Tr. 1091-1094 and Ct. Ex. 40 – 2dSLF 069-070):

1. Had Mr. Noe examined traffic counts for key roads or determined the city boundaries for the years 1961, 1970, 1980 or 1990. (Tr. 1094-1095);

2. How were the street designations determined; and

3. Could those street designations be shown as they were in 1961, 1970, 1980 and 1990. (Tr. 1095-1096)?

Counsel for the Landowners objected to the second question, but after the objection was overruled, it was rendered moot by the answer.[7]

4. Ben Hicks.

The videotaped deposition of Ben Hicks was then shown to the jury. (Tr. 1100; SLF 013-025). Mr. Hicks is a car dealership broker from Arlington, Texas (SLF 13), who testified as an expert in the location of automobile dealerships (in response to Mr. Hall). It was his opinion that the Landowners' property would not be an attractive location for a new car dealership (SLF 015) Mr. Hicks also testified that car dealers in general want to move to the suburbs and get to areas with more traffic flow (SLF 017).

5. Troy Willis.

Mr. Willis has been a real estate appraiser for 31 years (Tr. 1104) and provided expert testimony on behalf of City as it related to his valuation of the property. Mr. Willis has a MAI designation and had previous experience with car dealership appraisals. (Tr. 1105 and 1108). It was his observation that since the 1970s, many of the car

[7] The Landowners objected on the grounds that Mr. Noe was not qualified to answer the question. The answer indicated that Mr. Noe based his testimony about street designations on maps prepared by others and not on his own expertise (TR 1095).

dealerships had relocated from downtown Springfield to points further south and east. (Tr. 1179). His appraisal of the property (including equipment) indicated a value of $2,400,000. (Tr. 1111).

More questions by the jury were tendered and asked of Mr. Willis than any other witness. (Tr. 1264-1284 and Ct. Exs. 41 through 43 – 2dSLF 071-076). The 25 questions allowed by the trial court related to (1) his use of a land to building ratio; (2) the use of the Lipscomb[8] property as a comparable sale; (3) the construction costs used to value buildings on the property; (4) whether he was aware that the Youngblood[9] property was divided by South Campbell; (5) traffic counts as they related to the Behlman property and Branson on Highway 65; (6) when the Ford[10] dealership, James River Freeway[11] and the Battlefield Mall were constructed; and (7) why he chose to go with the cost approach in arriving at his opinion in value. (Tr. 1283-1284). None of these questions were objected to by counsel for Landowners and they cross-examined Mr. Willis further after the juror questions had been asked. (Tr. 1285-1287).

6. <u>Fred Wagner.</u>

[8] The Lipscomb property was a car sales facility which had been sold in January 1999 (less than a year before the taking) and which was located a few blocks away from the Thompson property. (Tr. 1151).

[9] The Youngblood dealership is located in south Springfield.

[10] The Ford dealership is located in South Springfield, near the new Thompson location.

[11] The James River Freeway runs in front of the new Thompson location.

Mr. Wagner has lived in the Springfield area for over 60 years. (Tr. 1292). He is a realtor and appraiser, and has had the MAI designation since 1973 (Tr. 1294), giving him approximately 36 years of experience as a real estate appraiser. Mr. Wagner had previous experience valuing car sales facilities in the Springfield area. (Tr. 1303-1304). He said that he had noticed a change in the location of car dealerships in Springfield and that all of them seem to have moved south[12]. (Tr. 1340-1341). In Mr. Wagner's opinion, the value of the property (equipment included) was $2,450,000. (Tr. 1307).

The 8 jury questions which were posed to Mr. Wagner (Ct. Exs. 44 through 46 – 2dSLF 077-081) primarily dealt with (1) adjustments he made to comparable sales; (2) whether the sale of the Behlman and Reliable Lexus facilities indicated that they were not in good locations, and (3) whether there were any streets running through the Reliable Lexus property. (Tr. 1421-1440). None of the questions asked were objected to by counsel for the Landowners. Counsel for the Landowners engaged in additional cross-examination of Mr. Wagner after the questions submitted by the jury and approved by the court had been asked. (Tr. 1438-1439).

The following table analyzes the questions submitted by the jurors during the six days of trial:

[12] The new Thompson facility is located in south Springfield.

WITNESS	SUBMITTED	ELIMINATED BY COURT	ELIMINATED BY OBJECTION	ASKED
George Thompson	15	3	9	3
Lynn Thompson	12	2	4	6
Walter Hall	12	4	7	1
Roger Chantal	2	1	0	1
Dave Mathewson	9	0	2	7
William Davis	12	1	5	6
Leo Cologna	0	0	0	0
Earl Newman	4	1	0	3
Kerry Noe	9	0	2	7
Troy Willis	27	1	1	25
Fred Wagner	17	2	7	8
TOTALS	**119**	**15**	**37**	**67**[13]

The jury returned a verdict of $2,543,000 for the property (LF 98-99).

[13] Fifty-six percent of the questions tendered by jurors were asked to witnesses.

POINTS RELIED ON

POINT I

For over 100 years, trial judges in Missouri have had discretion to allow juror questions. Here, the trial judge allowed jurors to submit written questions for witnesses after the attorneys had finished their examination. The court and counsel reviewed each question before it was asked. Only 67 of the 119 questions tendered were allowed. The trial judge did not abuse his discretion because he employed careful controls and limited the questions to only relevant and appropriate areas.

Callahan v. Cardinal Glennon Hosp., 863 S.W.2d 852 (Mo. banc 1993)

Schaefer v. St. Louis & S. Ry. Co., 30 S.W. 331 (Mo. 1895)

Sparks v. Daniels, 343 S.W.2d 661 (Mo. App. 1961)

United States v. George, 986 F.2d 1176, 510 U.S. 899 (1993)

Missouri Supreme Court Rule 70.02

Missouri Supreme Court Rule 70.03

POINT II

The trial court did not err in denying Landowners' request for a mistrial during voir dire because it is well established in Missouri that the mere mention of taxes or the commissioners in a condemnation proceeding is not prohibited and can in fact be a proper subject for voir dire. Moreover, the objections to those subjects were sustained in any event so there was no prejudice to the Landowners.

St. Louis Housing Auth. v. Barnes, 375 S.W.2d 144 (Mo. 1964)

State, ex rel. State Highway Comm'n. of Missouri v. City of St. Louis,

575 S.W.2d 712 (Mo.App. 1978)

State ex rel. Missouri Highway & Transp. Comm'n. v. Williams,

690 S.W.2d 836 (Mo.App.E.D. 1985)

State of Missouri, ex rel. State Highway Comm'n. of Missouri v. Select Properties, Inc.,

612 S.W.2d 866 (Mo.App. 1981)

POINT III

The trial court did not err in permitting the City to elicit testimony from Earl Newman about traffic counts because the testimony was not opinion evidence which required scientific, technical, or other specialized knowledge, but was in the nature of a records custodian. The City was therefore not required to disclose Earl Newman as an expert witness prior to trial.

Lazzari v. Dir. of Revenue, 851 S.W.2d 68 (Mo.App.E.D. 1993)

Bynote v. National Super Mkts., Inc., 891 S.W.2d 117 (Mo. banc 1995)

Sanders v. Hartville Milling Co., 14 S.W.3d 188 (Mo.App.S.D. 2000)

Hautly Cheese Co. v. Wine Brokers, Inc., 706 S.W.2d 920 (Mo.App. 1986)

POINT IV

The trial court did not err in permitting Fred Wagner to testify regarding traffic counts and trends in the relocation of automobile dealerships because this testimony was the personal observation of a long time Springfield, Missouri, resident and did not rise to the level of an expert opinion, it was cumulative to other evidence and, in any event, Mr. Wagner's report disclosed his knowledge and opinions on those subjects.

Concord Publishing House, Inc. v. Director of Revenue, State of Mo.,

916 S.W.2d 186 (Mo. banc 1996)

Sanders v. Hartville Milling Co., 14 S.W.3d 188 (Mo.App.S.D. 2000)

Keith v. Burlington N. RR Co., 889 S.W.2d 911 (Mo.App.S.D. 1994)

Porter v. Erickson Transp. Corp., 851 S.W.2d 725 (Mo.App.S.D. 1993)

POINT V

The trial court did not err in permitting the City to show the videotaped deposition of Ben Hicks because it was not an abuse of discretion to permit testimony by videotape when juror questioning was allowed during the trial.

McMullin v. Borgers, 806 S.W.2d 724 (Mo.App.E.D. 1991)

Wilkerson v. Prelutsky, 943 S.W.2d 643 (Mo. banc 1997)

POINT VI

The trial court did not err in denying Landowners' motion for new trial because the foregoing incidents referred to by Landowners do not constitute error, did not have a cumulative, prejudicial effect, and therefore an accumulation of non-erroneous incidents cannot result in error.

Callahan v. Cardinal Glennon Hosp., 863 S.W.2d 853 (Mo. banc 1993)

Baker v. Ford Motor Co., 501 S.W.2d 11 (Mo. 1973)

Stucker v. Rose, 949 S.W.2d 235 (Mo.App.S.D. 1997)

Smith v. Wal-Mart Stores, Inc., 967 S.W.2d 198 (Mo.App.E.D. 1998)

ARGUMENT

POINT I

For over 100 years, trial judges in Missouri have had discretion to allow juror questions. Here, the trial judge allowed jurors to submit written questions for witnesses after the attorneys had finished their examination. The court and counsel reviewed each question before it was asked. Only 67 of the 119 questions tendered were allowed. The trial judge did not abuse his discretion because he employed careful controls and limited the questions to only relevant and appropriate areas.

Introduction and Standard of Review

Missouri has long followed the majority rule that trial judges can permit jurors to question witnesses. This Court and the courts of many other states recognize that juror questions can enhance the fact-finding and decision-making function of the jury. The

rule thus provides the trial judge with a valuable tool to advance the jury's search for the truth at trial.

In this case, the trial judge allowed jurors to suggest questions provided: (1) they were written after the attorneys completed their questions; (2) all jurors turned in a paper, even if they had no questions; (3) they were reviewed by the judge; (4) attorneys had the opportunity to object outside the hearing of the jury; (5) if approved, they were asked by the attorneys; (6) the attorneys could ask follow-up questions; and (7) jurors were told to limit the number of questions. In this way, the trial court allowed the jury to clarify the evidence and fulfill their fact-finding function while protecting against possible prejudice.

Missouri law vests the trial court with broad discretion to allow juror questions at trial and to determine if any prejudice resulted from those questions. *Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852 (Mo. banc 1993). The trial court's decision to allow juror questions should therefore be reviewed for abuse of discretion. *Callahan,* 863 S.W.2d at 866-67. As this Court has stated:

> Judicial discretion is abused when the trial court's ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration; if reasonable people can differ about the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.[14]

[14] *Newman v. Ford Motor Co*., 975 S.W.2d 147, 151 (Mo. banc 1998)

The Landowners cannot establish that the trial court abused its discretion in this case.

A. The manner in which the trial court allowed juror questions was not an abuse of discretion in that the court provided sufficient guidance to counsel as to how the questioning would be handled, established a careful procedure to safeguard against potential prejudice, and did not deviate from that procedure.

This Court recognized long ago that juror questions serve the "commendable" purpose of allowing jurors to assess the facts and decide the case. *Schaefer v. St. Louis & S. Ry. Co*., 30 S.W. 331 (Mo. 1895). For this reason, the Missouri courts have consistently granted the trial judge discretion to allow juror questions at trial. Prior to the court of appeals' decision in this case, no Missouri court has reversed a jury verdict in a civil case on the grounds that juror questions were allowed.

This Court's decision in *Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852, 867 (Mo. banc 1993), is controlling. In that case, the Court informed the jurors that they would be permitted to submit written questions to him during trial. *Id.* at 866. The questions were originally shared with the attorneys, then, upon motion of one party, the judge discontinued sharing the questions but allowed the jurors to continue to submit them. The judge thereafter received a confusing question from a juror, and shared it with the attorneys. One of the attorneys recalled a witness to follow-up on the question. *Id.* at 867. The trial court denied the defense counsel's reject for a mistrial. This Court affirmed, stating that the "trial court . . .has discretion to permit or deny jurors the privilege of asking questions. . . .Therefore, the trial judge did not abuse his discretion in permitting the jurors to ask questions." *Id*.

In support of its decision, this Court cited *Sparks v. Daniels*, 343 S.W.2d 661 (Mo. App. 1961). In that case, the judge informed the jury that they would be allowed to ask questions if they did not hear what a witness said or if the words did "not carry meaning" to them. *Id*. at 663. The jurors asked a number of questions directly to the witnesses during trial; one juror went so far as to cross-examine a witness regarding the testimony. *Id*. at 667. The appellants sought to set aside the jury's verdict, claiming that the trial court invited error when he asked for juror questions at the outset.

The court of appeals disagreed, stating that "surely" there can be no prejudice from the jury hearing and understanding all of the testimony. *Id*. The court observed that it is proper for a juror to ask a question through the trial judge in order to clarify some point in the juror's mind, stating: "It has been said that among the trial court's inherent powers in the administration of justice is his power to interrogate witnesses." *Id*. The latter power encompasses the discretion to permit or deny the jurors the privilege of asking questions and "[w]hen it is permitted him to ask questions, the juror, to some extent at least, represents the court…" *Id*. at 667.

Callahan and *Sparks* are consistent with the overwhelming consensus of opinions from other federal and state courts that grant the trial judge broad discretion to allow juror questions. *See* list of cases at Appendix D (pps. A006-A007)**.** Several state courts actually encourage trial judges to allow juror questions.[15] Arizona, Florida, Kentucky,

[15] *See, e.g*. *Flores v. State of Nevada*, 965 P.2d 901 (Nev. 1998); *Transit Auth. of River City v. Montgomery*, 836 S.W.2d 413 (Ky. 1992); *State of North Carolina v. Howard*, 360 S.E.2d 790 (N.C. 1987).

Indiana and New Mexico have even adopted rules of procedure or evidence that expressly allow juror questions at trial.[16]

The United States District Court for the Eighth Circuit has similarly held that the practice of allowing juror questions is committed to the sound discretion of the trial court. *United States v. George*, 986 F.2d 1176, 1178-79 (8th Cir.), *cert. denied*, 510 U.S. 899 (1993)(district court did not abuse its discretion in allowing 65 juror questions during trial). Every other federal circuit agrees. *See* Appendix D (p. A007).

Since Missouri rules provide no procedural guidance on the practice of juror questions, the trial judge necessarily retains discretion in that area. Landowners argue that the court abused its discretion by failing to provide adequate advance warning that it intended to allow juror questions. The affidavit of the trial judge, however, reveals that he informed the parties that he was considering allowing juror questions on at least two occasions in advance of the commencement of the trial. *See* Appendix B (p. A002). Moreover, at the close of the first day of trial, before any evidence was presented, the judge revisited the juror questioning issue with counsel and concluded that he would allow it and would so instruct the jury. (Tr. 213-219). Counsel for Landowners objected to the process at that time, arguing that certain of the City's testimony was by videotape and questions would not be possible. (Tr. 216-17). The next morning, before opening statements, the trial court allowed Landowners' counsel to elaborate upon their objections. (Tr. 229, 236-37). Landowners had ample opportunity to object to the juror

[16] *See* AZ ST RCRP Rule 18.6., FL ST § 40.50, KY ST REV Rule 614, IN ST REV Rule 614, NMRA, Crim. UJI 14-101; *See* Appendix E, pps. A008-A014.

questioning process, and to prepare for and inquire into the details of the procedure used by the trial judge.

They also had ample notice of the manner in which the questioning would proceed. Before the trial commenced, the court read to the jury a modified version of MAI 2.01 (without objection from counsel), in which he informed the jury panel that they would be allowed to ask questions, that the questions would be subject to review by the court and attorneys to determine their propriety, and that the approved questions would then be asked by the attorneys. (LF 85-87). Before any questions were actually submitted to witnesses, he informed counsel that follow-up questions were allowed. (Tr. 465). The judge adhered to that procedure throughout the trial.

Landowners claim that advance notice of the juror questions would have altered their trial strategy, but they do not explain why or how their strategy would have changed. In *United States v. Collins*, 226 F.3d 457 (6th Cir. 2000), a party claimed that the court's failure to provide notice that it would allow juror questions prior to the first day of trial gave the party inadequate time to object or contemplate changes to trial strategy. The Sixth Circuit Court of Appeals rejected that argument, stating that the party failed to explain why it could not adequately object on the first day of trial and how the juror questions may have undermined its trial strategy. *Id*. at 463. Similarly, since Landowners could not predict what questions the jury would ask, it is difficult to discern how Landowners could have possibly altered their trial strategy before the trial commenced. They have offered no specific examples to elucidate their claim.

Landowners also claim that their unfamiliarity with the process made them appear inexperienced. The record belies these claims. A fair reading of the transcript in this case indicates that Landowners' counsel adapted very quickly to the process and were quite willing to ask the questions that clarified testimony of their own witnesses. In fact, Landowners' counsel readily agreed to ask the first questions that were tendered from the jury to a witness. (Tr. 461-467). Landowners counsel, who admittedly possess "extensive experience in trying cases of this nature," was quite adept at handling the juror questions in this case. Interestingly, in closing argument the Landowners' counsel candidly expressed his satisfaction with the jury questioning process:

> "I must tell you though, when I came into this case I thought the idea of jury questions - - this is the only time I've ever had experience with that. I thought well, I don't like the feel of that. You know, we all think we want to be in control of these things, and that's kind of spooky.
>
> But there's another fear that you have when you try a case, certainly when people like this put their faith in you. You think, am I going to live up to their expectations? Am I going to ask all the right questions and do all the right things?
>
> Well, I didn't. I missed some things, but you all picked them up. And I think that the jury questions that you put forward filled in a lot of blanks for me. And some of

them were directed to the very nature of this business, the very use of this property." (Tr. 1465-66).

Advance notice of the process was not necessary for counsel to provide input on the juror questioning process as Landowners claim. The judge has the discretion to allow juror questions; he also has the discretion to decide how the questioning should proceed. A party has no right to negotiate a process that each deems most beneficial to its case.

The judge in this case actually did far more than the judges in either *Callahan* or *Sparks* to educate the parties about the jury questioning process and consistently adhere to that process. In neither of those cases did the courts provide notice prior to trial that they intended to allow juror questions. In this case, the trial judge raised the issue with counsel early on in the case, and again before evidence was received.[17] He then stuck with the process he established throughout the trial. In contrast, the trial judge in *Callahan* was actually quite inconsistent on this issue, originally allowing the jurors to ask questions which he shared with the attorneys, then ruling that it would not share the questions with the attorneys, then proceeding to do exactly that when a juror submitted a confusing questions. *Callahan*, 863 S.W.2d at 866-67. This Court still held that the court's behavior was not an abuse of discretion.

The Massachusetts case of *Commonwealth v. Urena,* 632 N.E.2d 1200 (Mass. 1994), cited by Landowners, does not state the prevailing view of this issue. While numerous courts have addressed the preferred process for juror questions at trial,

[17] See Affidavit of Judge Holden Appendix B (p. A002), and the discussion with counsel at Tr. 213-219)

notifying the parties prior to commencement of the trial is generally not included in the suggested procedures. Those courts, and the rules of procedure adopted by several states, embrace a process quite similar to that employed in this case -- a process whereby questions are submitted in writing, counsel has an opportunity to object to the questions, and their admissibility is determined outside the presence of the jury.[18] The trial court faithfully followed that process during trial. All of the questions were written, carefully screened by the judge and counsel outside the hearing of the jury, and submitted to the jury with follow-up questions by the attorneys as desired.

The questions tendered by the jury were only *suggested* questions. There was no guarantee that any of the questions would actually be asked, and nearly half of them were rejected by the judge or the attorneys.[19] This process sufficiently safeguarded against the risk of prejudice from the juror questioning process.

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[18] *See, e.g*., *United States v. Brockman*, 183 F.3d 891, 899 (8th Cir.), *cert. denied*, 528 U.S. 1080 (2000); *Flores v. State of Nevada*, 965 P.2d 901, 902-903 (Nev. 1998); *State of Montana v. Graves*, 907 P.2d 963, 966 (Mont. 1995); *People v. Cummings*, 850 P.2d 1, 48 (Cal. 1993);*Transit Auth. of River City v. Montgomery*, 836 S.W.2d 413, 416 (Ky. 1992); *Spitzer v. Haims and Co., et al*., 587 A.2d 105, 113 (Conn. 1991); *State of North Carolina v. Howard*, 360 S.E.2d 790, 795 (N.C. 1987); *State of Arizona v. LeMaster*, 669 P.2d 592, 597-98 (Ariz. 1983). *See also*, rules of procedure set forth in Appendix E (pps. A008-A014).

[19] Of 119 questions suggested by the jurors, 15 were refused sua sponte by the trial judge and 37 were excluded on the objections of counsel.

Landowners also argue that the trial court abused its discretion by changing the juror questioning procedure during the trial. In particular, they argue that the lawyers could only ask the question as written for the first witness, but asked follow-up questions for subsequent witnesses. The record contradicts Landowners' claim. During the examination of the very first witness, counsel requested clarification of the juror questioning process and the judge replied that after the juror questions were asked, "If you want to ask some follow up – just like normal, when you're done, we're done." (Tr. 465). The judge clearly informed all counsel at that time that follow-up questions were permissible. Landowners' failure to ask any such questions with respect to that witness does not establish an inconsistency in the process.

Finally, Landowners argue that the juror questioning process was not uniform in that Ben Hicks, one of the City's witnesses, appeared via videotape and thus could not be questioned by the jury. Landowners' complaint is inherently inconsistent. If Landowners are claiming prejudice because the jury did not have an opportunity to question Mr. Hicks, are they not conceding that the jury questions added value to the trial?

The Landowners have not cited any cases which hold that jury questioning should not be allowed when any witness appears by deposition. Given the modern propensity toward videotaped testimony, such a rule would severely hamper the trial court's ability to allow juror questions. Surely, this is exactly the reason that the trial court has discretion to determine when juror questioning is appropriate based upon the facts of a particular case.

In this case, the judge himself indicated that the inability of the jury members to question Mr. Hicks would be more of a detriment to the City. (Tr. 217). Landowners' counsel agreed. (Tr. 236). The Landowners do not claim that that the jury would in fact have tendered any questions to Mr. Hicks, or that the questions would have been helpful to them. The juror questions approved and asked of the witnesses tended to merely clarify the testimony. Therefore, the party offering a witness bore the burden associated with failing to call the witness live. Landowners cannot establish any prejudice to them based upon the jury's inability to question Mr. Hicks.

The procedure the trial court followed for the juror questions in this case was carefully designed and consistently applied to avoid any potential prejudice. Landowners have failed to establish that the manner in which the trial court conducted the juror questioning process constituted an abuse of its discretion. Nor have they identified anything but purely speculative prejudice from the alleged errors in the process.

B. The trial court's indication that he would allow juror questions in this case conformed with existing law and the sound objectives of the jury system.

Landowners claim that this case cannot be reconciled with *Callahan*, and they seek to create new law by asking this Court to find that the trial judge exceeded his authority by somehow acting to "invite or actively encourage juror questioning." Appellants' brief, p. 31. To the contrary, it is evident that the trial judge walked cautiously upon the roadbed established by the cases starting with *Schaefer* and ending with *Callahan*.

In *Callahan*, the Court stated that the trial judge did not encourage the jurors to ask questions, "he only indicated that he would allow the jurors to ask questions during trial." *Callahan*, 863 S.W.2d at 867. The trial court's instruction in this case paralleled that rule, stating:

> You will be given the opportunity to ask written questions of any of the witnesses called to testify in this case. You are not encouraged to ask large numbers of questions because that is the primary responsibility of counsel. . . . (LF 87).

The Connecticut Supreme Court has concluded that virtually identical language in a preliminary instruction did not "encourage" questions by the jury. *Spitzer v. Haims and Co., et al.*, 587 A.2d 105, 109 n.4. (Conn. 1991). Therefore, this Court need look no farther than its decision in *Callahan* to decide this issue.

At most, the trial court simply informed jurors that they had the privilege to submit questions. There was no promise that any of the questions would ever be asked. The approach taken by the judge was far more careful than that which was used in both *Schaefer* and *Sparks* where jurors were allowed to question witnesses directly. The trial judge left the door open to restricting or halting jury questioning altogether if the process got out of hand. In fact, when the judge discussed the possibility of jury questioning with the attorneys before evidence was heard he indicated that he would be "a lot more directive" if the jury strayed off course or the questions became too burdensome. (Tr. 214). Obviously, the Landowners agreed that neither of those things occurred and that

the jury was not overly "encouraged" to ask questions because they made no objection to that effect after the evidence began.

In any event, the distinction between "allowing" juror questions and "encouraging" juror questions cannot be the test to determine the propriety of those questions. A system that gives the trial judge discretion to allow a practice, but prohibits that judge from encouraging use of the practice is contradictory at best. Moreover, the distinction between "encouraging" and "allowing" the practice is so nebulous and unpredictable that it would create a mine field for any trial judge who decides to permit jury questioning. The approach advocated by the Landowners is to place the burden on the jury to beg for the privilege of asking questions (without telling them that they have that privilege). Then if the jury fails to seek the privilege before the first witness is called it is lost because counsel did not anticipate that intrusion. It seems that the whole idea of empowering jurors to discover more about the case is a dark and dreaded secret, to be hidden lest it rear its ugly head.

Juror questions are not taboo. Instead they further the central goal of the jury trial -- the search for the truth. Jurors who are confused about the evidence are less likely to reach informed decisions. Juror questions can thus enhance the basic fact-finding function of the jury. This Court recognized that juror questions serve this "commendable" purpose long ago. *Schaefer v. St. Louis & S. Ry. Co.*, 30 S.W.2d 331 (Mo. 1895). Similarly, the Missouri court of appeals has recognized that juror question serve the beneficial goal of allowing jurors to clarify evidence. *Sparks*, 343 S.W.2d at 667.

Jury questions may not be appropriate for every case, but this case was ideally suited for the practice. The issue in the case was the value of a large tract of commercial real estate with 6 commercial buildings. That task ordinarily requires trained experts who spend days assembling and analyzing mountains of information about the details of the property and improvements. None of the jurors in this case possessed those qualifications. (Tr. 111). In presenting this case, the parties paraded a total of 7 expert witnesses to the stand. Most of those witnesses had prepared voluminous reports discussing the comparisons between multi-million dollar facilities in Missouri and other states. The valuation of the property involved issues of construction costs, depreciation (curable and incurable), functional obsolescence (curable and incurable), external (economic) obsolescence, and adjustments for size, age, location, quality of construction and differences in improvements. This is a complex case, and one where the jurors understandably needed help as they struggled to reach a decision.[20]

Numerous other state and federal courts have approved the practice of juror questions within the discretion of the trial court based upon the recognition that juror questions assist in the fact-finding and decision-making process. The Supreme Court of Kentucky approved juror questions, stating:

[20] The courts recognize that juror questions are particularly appropriate to help jurors clarify the evidence in complex trials that involve expert testimony or financial or technical evidence. *United States v. Richardson*, 233 F.3d 1285, 1289 (11th Cir. 2000); *United States v. Collins*, 266 F.3d 457, 462 (6th Cir. 2000).

> The jury--of all people--has the right to have questions--proper questions--answered. Such can only further their duty, their purpose, their raison d'etre, to search out the truth.

Slaughter v. Commonwealth of Kentucky, 744 S.W.2d 407, 413 (Ky. 1987). *See e.g., Flores v. State of Nevada*, 965 P.2d 901, 912 (Nev. 1998)(the practice of juror questioning can significantly enhance the truth-seeking function of the jury); *State of Kansas v. Hayes*, 883 P.2d 1093, 1101 (Kan. 1994)(juror questions are consistent with the court's view of trial as a quest for the truth); *State of North Carolina v. Howard*, 360 S.E.2d 790, 794 (N.C. 1987)(a juror may, and often does, ask a pertinent question in furtherance of the truth). As the Fifth Circuit Court of Appeals aptly stated:

> If a juror is unclear as to a point in the proof, it makes good sense to allow a question to be asked about it. If nothing else, the questions should alert trial counsel that a particular factual issue may need more extensive development. Trials exist to develop the truth.[21]

In addition to the potential for jurors to more completely comprehend the evidence, the courts have identified other benefits to juror questions, including: (1) increased juror attentiveness; (2) the opportunity for trial attorneys to better understand the jurors' thought processes and their perception of the case weaknesses; and (3) greater juror satisfaction. *See, e.g., Flores*, 965 P.2d at 902; *Yaeger*, 502 A.2d at 1000.

[21] *United States v. Callahan*, 588 F.2d 1078, 1085 (5th Cir.), *cert. denied*, 444 U.S. 826 (1979).

A Missouri Jury Study conducted in 2000 by the Civil Jury Study Committee of the Missouri Bar for submission to this Court reported that 87% of jurors that participated in the study found juror questions helpful in determining the issues in the case (see Appendix F (p. A023).[22] The lawyers and judges that allowed jurors to ask questions also found it helpful to both the jurors and the court in clarifying issues and witness testimony. *Id*. at Appendix F, page A016. Presumably for these reasons, several judges in Missouri choose to allow juror questions during trials.[23]

Landowners warn that the trial court's invitation for juror questioning promotes premature deliberations and urges the jurors to become active inquisitors. They cite in support the cases of *United States v. Amjal*, 67 F.3d 12 (2nd Cir. 1995) and *DeBenedetto v. Goodyear Tire and Rubber Co*., 754 F.2d 512 (4th Cir. 1985). In *DeBenedetto*, although the court warned of potential dangers of juror questions, it found that the ninety-five questions submitted by jurors in that case did not prejudice the defendant. 754 F.2d 512. *Amjal*, one of the very few cases in which the court has concluded that juror questioning amounted to an abuse of the judge's discretion, involved a criminal trial in which the judge allowed extensive juror questions of the defendant. The court noted that

[22] Selected pages from the Report to the Supreme Court of Missouri from the Civil Jury Study Committee dated October of 2000 as set forth in Appendix F (pps. A015-A023).

[23] See Comment, *Juror Questions A Survey of Theory and Use*, 55 Mo.L.Rev. 817-818, 833-38 (1990). The Missouri Jury Study reports that 19% of jurors in the State are permitted to submit questions for witnesses. Report to the Supreme Court of Missouri from the Civil Jury Study Committee dated October of 2000, Appendix F (p. A021).

"juror questioning is particularly troublesome when it is directed at the defendant himself in a criminal trial." *Id*. at 14. Nevertheless, the Second Circuit Court of Appeals has refused to adopt an absolute prohibition on juror questions, holding that the practice lies within the discretion of the trial court. *United States v. Bush*, 47 F.3d 511, 524 (2d Cir. 1995)(finding that juror questions did not constitute plain error or abuse of court's discretion).

The majority of jurisdictions have taken the view that the benefits of juror questions, subject to proper safeguards by the trial judge, outweigh any perceived dangers. In *Spitzer*, the Connecticut Supreme Court considered the challenge that juror questions fostered premature deliberations. The court found that the mere request for more information does not equate to "deliberation":

> Deliberation in this sense, however, means articulating and exchanging views, albeit preliminary, with one's fellow jurors. It does not mean the absence of thought, however preliminary. . . . 'The trial court is expected to prevent premature deliberation, not harness the human mind.' . . . . Permitting jurors to ask questions about what they have heard and seen does not transform their inevitable mental processes into constitutionally impermissible deliberation.[24]

The court further observed that the procedures implemented by the trial court adequately avoided the risks associated with juror questions. *Id*. at 113.

[24] 587 A.2d at 111-12 (*quoting State of Utah v. Johnson*, 784 P.2d 1135, 1145 (Utah 1989)).

The vast majority of courts addressing the issue have determined that proper safeguards by the trial judge can eliminate the potential risks of juror questions. Those safeguards include written questions submitted for review and objection of counsel outside the hearing of the jury, often with opportunity for follow-up questions.[25] Several courts also emphasize the value of a preliminary instruction similar to that given in this cases explaining the procedure for the questions and why certain questions will not be asked. *LeMaster*, 669 P.2d at 597; *Spitzer*, 587 A.2d 113-14; *Yeager*, 502 A.2d at 100; *United States v. George*, 986 F.2d 1176, 1178-79 (8th Cir. 1993).

The trial court's practices in this case sufficiently safeguarded against the concerns the Landowners voice. This Court's approval of the juror questioning process employed in this case comports with the prior decisions of this Court and the well reasoned opinions of the majority of other jurisdictions that have addressed this issue. Most importantly, it is consistent with the objectives of the jury system itself.

In fact, meaningful advances to help juries with their duties seem to be the trend in Missouri. In 1996, this Court approved a rule that allowed jury note-taking at the discretion of the trial judge. Rule 69.03. *See also* MAI 2.01. Just recently, this Court amended the rule to sanction more liberal usage, authorizing note-taking at the request of the judge, any party *or* a juror. Prior to the adoption of the Rule, opponents of juror note-taking voiced many of the same concerns expressed by the Landowners, fearing that the jurors would not remain neutral. *State of Missouri v. Trujillo*, 869 S.W.2d 844, 849 (Mo.

[25] See cases cited in footnote 18, *supra,* and rules of procedure in the Appendix E (pps. A008-A014).

App. 1994). The Court of Appeals for the Western District of Missouri concluded that the advantages of juror note-taking in assisting the jurors in remembering and evaluating the evidence outweigh the supposed dangers. *Id*. at 850. In so holding, the court expressed its "abiding faith in the good judgment of jurors to understand their function and to act on their duty responsibly." *Id.* The same rationale favors a rule that allows the trial judge to permit jury questions.

Isn't the real reason for denying juries the privilege of offering questions simple arrogance? Lawyers are allowed to ask questions if they lead to relevant facts. Trial and appellate judges are allowed to ask questions they deem necessary to clarify issues. But, according to the Landowners, jurors are excluded. Is that because they are unqualified? If so, then what qualifies them to make the final decision on the facts of the case? Or, perhaps jurors are excluded because they might be distracted. Is distraction somehow more of a concern than confusion? Perhaps there is a fear that weaker lawyers will be unnecessarily helped by the jury bringing out matters that the lawyers overlooked. If so, justice and truth in trials can only be measured by the quality of the parties' attorneys, and the process of justice leaves out justice in the process! Does the legal profession really need this protection at the cost of justice? Surely our profession is not so fragile.

It is the content of the question, not its source, which measures its worth. In this case the trial judge ensured that he and both lawyers scrutinized the questions before they were voiced to the witness and the entire panel. None of the questions from the attorneys had endured such a test, and probably not many would have passed it. Surely it cannot be

said that the firewalls this trial judge erected were too thin. The trial court's allowance of jury questions in this case was not an abuse of discretion.

C. The record is devoid of any evidence of prejudice to Landowners from the juror questioning process or the particular questions asked in this case.

Regardless of the mechanics for juror questioning, the Landowners have not established how that process or the questions themselves materially affected the verdict. *Lewis v. Wahl*, 842 S.W.2d 82 (Mo. 1992); *Callahan*, 863 S.W.2d at 867. As was mentioned earlier, in only one instance did the Landowners object to a jury question which was actually asked. No prejudice resulted to the Landowners from the question, and they have never claimed otherwise.[26]

In *Callahan*, this Court held that even if the trial judge erred in sharing a juror question with the attorneys, the appellant failed to show that it was prejudiced by the testimony in response to the question. This Court stated that "[t]he trial judge is in the best position to determine whether a juror's question prejudiced a litigant." *Id*. at 867. Similarly, in *Sparks*, the court held that the verdict should not be reversed due to juror questions absent a finding that the questions dealt with extraneous, immaterial or prejudicial matters or misstatements of the evidence. *Sparks*, 343 S.W.2d at 668. The court held that even if the jurors' direct questioning of the witnesses may have gotten out

[26] Landowners objected on the grounds that a question to a lay witness required expertise, the court overruled the objection on the grounds that the question could be answered without expert testimony and the witness in fact so answered the question. (Tr. 1092-96). Landowners have asserted no prejudice in connection with this question.

of hand, it would defer to the trial court's judgment that no error resulted as he "had the best opportunity to evaluate the true effect of such a situation." *Id*.

Landowners utterly failed to meet their burden in this case. Landowners have not identified any questions that dealt with extraneous, immaterial or prejudicial matters or misstatements of the evidence. The questions posed of each witness as set forth in the City's Statement of Facts reveals that the questions were simply attempts by the jury to clarify issues raised during questioning by the attorneys. (Tr. 460-465; 566-570; 644-653; 711-713; 863-865; 1010-1014; 1068-1069; 1091; 1264-1269; 1421-1427; 2dSLF 028-081).

Landowners argue that the juror questioning encouraged premature deliberations. Yet Landowners do not refer to one question that reveals a juror's premature inclinations in the case. In *United States v. Richardson*, 233 F.2d 1285 (11th Cir. 2000), the defendant argued that juror questioning led to premature conclusions about the case. The court rejected that argument, noting that the defendant cited no evidence in the record indicating that the jurors talked to each other about the questions they planned to ask and the questions themselves did not reflect any opinions the jurors may have held. *Id*. at 1291.

Landowners argue that the questions invited the jurors to become inquisitors. Yet they have not identified one question that reveals advocacy or bias on the part of a juror. In *United States v. Brockman*, 183 F.3d 891, 898 (8th Cir. 1999), the court rejected a similar claim that juror questions transformed the jurors into advocates. It did so on the

grounds that the defendant identified no particular incidents of bias and thus no more than speculative prejudice. *Id*.

Landowners also claim error from the number of questions asked and the delay in the proceedings associated with the questions. Prejudice is based upon "the effect of the questions on the trial, not the number of questions, in and of itself." *United States v. Cassiere*, 4 F.3d 1006, 1017 (1st Cir. 1993). In *DeBendetto v. Goodyear Tire & Rubber Co.*, 754 F.2d 512, 517 (4th Cir. 1985), the court upheld a verdict where the trial court asked ninety-five juror questions, finding no bias after its review of each of those questions. *Id*. *See also United States v. George*, 986 F.2d 1176, 1178-79 (8Th Cir. 1993)(trial court did not err in allowing jury to submit 65 questions to witnesses); *Prather v. Nashville Bridge Co.*, 236 So.2d 322 (Ala. 1970)(court found no basis for reversal where trial court allowed jurors to ask more than 100 different questions of witnesses).

There is no basis to find undue delay, or any reason to assume that the jury was frustrated with the time devoted toward juror questions. Nor is there any reason to assume that any such frustration was directed at Landowners' counsel rather than the City's counsel. Most of the questions from the jury were directed to the City's witnesses, and were posed by the City's counsel.

The careful screening process that the judge employed throughout the trial prevented the introduction of extraneous issues at trial. That fact is made clear by fact that there was only one jury question which was asked over Landowners' objection and by their failure to point to that question as improper now. Clearly, the Landowners viewed the juror questions as either harmless or beneficial to their case. The comments

of their attorney during closing arguments remove any doubt on that point. (Tr. 1465-66). Moreover, by failing to object to the particular questions actually posed to the witnesses, the Landowners waived any error with respect to those questions. *Thomas v. Wade*, 361 S.W.2d 671 (Mo. 1961); *Wolf v. State of Missouri, ex rel. Missouri Highway and Transp. Comm'n.*, 910 S.W.2d 294 (Mo. App. 1995). The questions themselves must therefore be reviewed for plan error, and defendants have not and could not establish that any of the questions rise to that level. See Civil Rule 84.13.

The verdict in this case fell within the range of the valuation testimony offered by the experts at trial. In condemnation cases, it is well established that the appellate court cannot infer bias, passion or prejudice from a verdict within the range of the valuation evidence. *City of Lee's Summit v. Hinck*, 618 S.W.2d 719,722 (Mo. App. 1981). The party raising that issue must show some incident or occurrence that creates such bias, passion or prejudice. *Id*. Landowners have failed to meet their burden in this case.

D. The trial court's addition of harmless language to MAI 2.01 did not constitute prejudicial error.

Landowners argue that the trial court erred by improperly modifying MAI 2.01. No judgment is to be reversed on account of instructional error unless the error materially affected the merits of the case. *Hill v. Hyde*, 14 S.W.3d 294, 296 (Mo. App. 2000). Reversal is not warranted when the defending party establishes that the instruction was not erroneous or that it created no substantial potential for prejudicial effect. *Id*. This Court's review of the trial court's ruling is *de novo*. *Id*.

1. Landowners failed to preserve the right to claim error from Instruction 2.01.

Missouri Supreme Court Rule 70.03 states:

> Counsel shall make specific objections to instructions considered erroneous. No party may assign as error the giving or failure to give instructions unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection. . . .

Moreover, Rule 70.02(c) provides that the prejudicial effect of a deviation from MAI instruction shall be determined by the courts, "provided that objection has been *timely* made pursuant to Rule 70.03." (emphasis added).

The Missouri Courts strictly apply this rule. In *Brown v. Wallace*, 52 S.W.3d 21, 23 (Mo. App. 2001), the court held that when a party made several objections to an instruction but failed to object to the use of a particular word in the instruction during trial, he failed to preserve that instructional error for appeal under Rule 70.03. Prior to the current version of 70.03, the Missouri courts held that a party who failed to object to deviations from MAI 2.01 *at the first available opportunity* waived any claimed error. *State of Missouri v. Ward*, 588 S.W.2d 728, 730 (Mo. App. 1979)(*quoting, Brown v. Thomas*, 316 S.W.2d 234 (Mo. App. 1958))(party waived error from a court's comments during MAI 2.01 when he failed to object at the time the comments were made and failed to give the court the opportunity to correct the alleged problem). *See also Dorsey v. Robinson*, 600 S.W.2d 59, 60 (Mo. App. 1980).

Landowners did not assert any objection to the trial court's MAI 2.01 at the time the court read the instruction, during the instruction conference, or anytime before the jury retired. (Tr. 249; Tr. 1441). Counsel for both parties were informed by the trial judge that he intended to submit a preliminary instruction about jury questions before the start of evidence. (Tr. 215). Neither party objected to that proposal at the time it was made or at any other time before the verdict. Landowners therefore failed to preserve for review any claimed error from the instruction. Landowners' overall objection to the juror questioning process is much different than a *specific* objection to the language in MAI 2.01. It is certainly conceivable that the trial court might have allowed the juror to ask questions during trial without adding any language to MAI 2.01. The Landowners did not raise the objection to give the court any opportunity to avoid the alleged error.[27]

The trial court's failure to hold an instruction conference prior to reading MAI 2.01 does not excuse Landowners' failure to object. The Missouri rules distinguish between MAI 2.01, a preliminary instruction given prior to opening arguments, and the final instructions on the law in the case, given prior to closing arguments. Rule 70.02(f). The instruction conference is held "to determine the instructions to be given," and thus refers to the instructions on the law and not standard preliminary instructions. Rule

[27] Landowners' motion for new trial is not sufficient to preserve the issue for review. Landowners general objection to the deviation from MAI 2.01 lacks the specificity required by the Missouri courts. In addition, Landowners could not raise the issue for the first time in the post-trial motion when they failed to assert the objection at trial. *Dorsey*, 600 S.W.2d at 60 n.1.

70.02(e). For that reason, the instruction conference is universally held after the submission of evidence and prior to closing arguments. Landowners could have objected to MAI 2.01 at the time the court read the instruction or anytime during the trial. They did not, and they cannot now complain of error relating to that instruction.[28]

2. Even if properly preserved for review, the trial court's addition of language to MAI 2.01 did not create substantial potential for prejudicial effect.

Even if Landowners had properly preserved this issue for review, they could not establish that the court's addition of language to MAI 2.01 constitutes reversible error.

All deviations from MAI instructions do not constitute reversible error. Rule 70.02(c)(prejudicial effect of instruction in violation of this Rule to be judicially determined). Such error is not reversible if there is a showing that no prejudice resulted from the deviation. *Means v. Sears, Roebuck & Co*., 550 S.W.2d 780, 786 (Mo. 1977). The courts' goal in preserving the integrity of the MAI instructions is to prevent confusion or disagreement regarding the text of the standard instructions that could affect the jury's decision-making process.

In *State of Missouri v. Cross*, 594 S.W.2d 609 (Mo. 1980), this Court considered an appeal from a criminal conviction. The trial judge read MAI-CR 2.01 and 2.02 to the jury and then engaged in lengthy explanation of those instructions to the jury. Portions

[28] The courts refuse to find plain error from deviations to MAI 2.01 absent a demonstration as to how the court's comments prejudiced a party or affected the outcome of the trial. Rule 84.13(c); *Mosher v. Levering Inv. Inc.*, 806 S.W.2d 675, 677 (Mo. banc 1991); *Dorsey*, 600 S.W.2d at 60. The Landowners cannot satisfy that standard.

of the explanation dealt with "matters of practical concern" such as the sequestration process. Other portions delved into the jury's fact-finding function and offered contradictory statements regarding the burden of proof. This Court observed that informing jurors of the routines they would be required to follow was commendable, but that the court's remarks went much further and invited confusion about the instruction, particularly the inconsistent statements regarding the defendant's burden of proof. *Id*. at 610. The Court noted, however, that "[p]erhaps there are circumstances where minor deviations from the prescribed course would be justified." *Id*.

Based upon those guidelines, the appellate courts have generally found deviations from MAI 2.01 to be prejudicial when the comments omit or confuse a material directive to the jury. *Chapman v. Bradley*, 478 S.W.2d 873 (Mo. App. 1972)(court gave a version of MAI 2.01 that omitted a material aspect of the instruction). In contrast, the courts have recognized that slight deviations to MAI 2.01 do not create prejudicial error "[w]hen the deviation cannot cause error in the jury's decision-making process." *Davis v. Moore*, 601 S.W.2d 316, 320 (Mo. App. 1980). *See also State of Missouri, ex. rel., State Highway Comm'n. of Missouri v. Zahn, et al*., 633 S.W.2d 185, 187-88, (Mo. App. 1982); *Hill v. Hyde*, 14 S.W.3d 294, 297 (Mo. App. 2000).

In this case, the judge read MAI 2.01 verbatim, without comment or interruption. (LF 85-87); Appendix B, (pps. A003-A005). He gave the written text of that instruction to the jury as well. All the trial court did was to add a few lines at the end to explain the juror questioning process. The latter was simply a "matter of practical concern." It did not misstate the law or confuse the jury with regard to its decision-making function.

Landowners argue that the instruction affected the merits of the case by imposing on the jurors the role of inquisitor and subjecting *counsel* to a novel procedure. Appellant's Brief, p. 24. Those effects, even if true, flow from the juror questioning process itself, not the court's innocuous instruction as to how the process would work. In fact, as previously stated, some courts have held a preliminary instruction on the juror questioning process *protects* against potential prejudice from juror questions. The trial court's addition of this language to MAI 2.01 was not reversible error.

E. Conclusion.

Every lawsuit is a search for the truth. We have based our entire system upon the belief that the collective wisdom of 12 citizens, evaluating the relevant facts presented in court, will yield just results.

The lawyers and the trial court asked questions designed to put that truth before the jury. The jury must have that truth to do its job—and the more it has, the better it will do its job.

Along with many things in a trial, juror questioning must be carefully monitored to insure that they do not lead to some improper influence on the jury. But the practice can be a valuable tool for the jury in its search for the truth, and the trial judge should have the discretion to place it within the jury's grasp.

The arguments against permitting any juror questions in reality presuppose that the trial judges in this state cannot or will not exercise proper restraint over the practice. The experience in this case demonstrates the flaw in that argument. The judge here announced at the outset that he would actively search for signs that the questions went

beyond the proper scope of clarifying the testimony. He made good on that promise by eliminating nearly half of the questions asked. Proof of the trial judge's careful control is apparent from the lack of any complaint in this appeal about even one of the questions posed by the jury.

The plain fact is that the system of jury questioning employed in this case did provide the opportunity for pertinent information to be brought before the jury, and provided more safeguards to weed out impertinent or scandalous material than if those questions had been asked by a lawyer—even if the objection to it were sustained, and the jury was told to disregard the impropriety. And the same level of appellate review is still available in case the trial court erred in permitting such questions to be asked.

Refusing to allow pertinent and probative questions to be asked based solely upon the identity of the questioner is a bad idea. Not only does it deny the jury the raw material needed to let the system function, but it sends them the wrong message—that they couldn't possibly think up a question of merit; that their role is that of automaton; that they are only minor participants in the search for justice. A rule prohibiting the jurors from asking pertinent questions makes the arrogant assumption that only the lawyers and judges could possibly think up anything worth knowing, and in doing so it denies the very basis for the jury—that 12 people of widely varied background and life experiences can pool their wisdom and reach a just result based upon the relevant facts.

Upon that belief, we have staked our all. We should welcome pertinent questions by informed jurors asked with proper safeguards. To do otherwise is to deny the validity of the very system we serve.

POINT II

The trial court did not err in denying Landowners' request for a mistrial during voir dire because it is well established in Missouri that the mere mention of taxes or the commissioners in a condemnation proceeding is not prohibited and can in fact be a proper subject for voir dire. Moreover, the objections to those subjects were sustained so there was no prejudice to the Landowners.

A. Standard of Review.

The standard of review on this point is found in *Stucker v. Rose*, 949 S.W.2d 235 (Mo.App. 1997). The denial of a mistrial "rests in the sound discretion of the trial court, and absent a manifest abuse of that discretion, appellate courts will not interfere." *Id. at 238*.

B. Reference to "taxes".

Landowners argue that the trial court abused its discretion in denying a mistrial because the City's counsel mentioned "taxes" in voir dire. The statement by City's counsel about which the Landowners complain is as follows:

> "Now there may be somebody on the panel that feels like well, look, if I award Thompsons this money, my taxes might go up as a –" (Tr. 124-125)

Landowners' counsel interrupted at that point, made an objection and moved for a mistrial. (Tr. 125). At side bar, the trial court sustained the objection but delayed ruling on the Landowners' motion for mistrial until after the trial was completed, at which time it denied the request. (Tr. 127; 1456).

The Landowners have mischaracterized the statement of counsel for the City and its intended purpose. City's counsel never suggested or argued to the veniremen that their taxes would increase in the event of a large award. To the contrary, had counsel been allowed to finish his question, he intended to determine if anyone on the panel had a preconceived notion that the award to Landowners could affect their taxes, and if so, the reason for that belief and its impact on their ability to be impartial.[29] City's counsel hoped to insure that no one on the panel believed that they had a personal stake in the outcome (i.e., a motel operator), or had a personal bias against the tax for this park. Landowners' counsel objected to the statement immediately after the City's counsel uttered the word "taxes." The court sustained that objection and instructed the City's counsel not to pursue that line of questioning. The City's counsel complied. The trial judge also offered to give a corrective instruction to the jury or to take some other affirmative action, but Landowners' counsel did not avail himself of that offer. (Tr. 130).

The City's reference to "taxes" in this case was neither objectionable nor prejudicial. Both parties had an interest in knowing if someone on the venire panel had a personal stake in the outcome, or believed that they did. In any event, the prompt action of the court in sustaining the objection to the utterance of "taxes" leaves no grounds for a mistrial.

[29] The park is funded by a motel and hotel tax adopted by voters for that purpose. Any impact on local residents was, therefore, minimal since it would not affect property taxes.

Even in condemnation cases, the law in Missouri is clear that the mere mention of "taxes" is not an automatic error, nor is it enough to require a mistrial. The clearest proof of that statement is found in one of the cases cited by the Landowners.

Landowners rely on *St. Louis Housing Auth. v. Barnes*, 375 S.W.2d 144 (Mo. 1964). In that case the St. Louis Housing Authority condemned property in the City of St. Louis for the construction of low rent housing projects. Counsel for the Housing Authority stated: "The authority feels that it is using taxpayers' money. It feels that when it does that, it must pay no more than what the property is worth at that time." *Id.* at 148. Counsel for the property owner objected. The trial court sustained the objection and told the jury: "Any reference to taxpayers' money. It will be stricken and the jury is instructed not to take or consider that in any decision they return in this court." *Id.* at 148. The property owner's motion for a mistrial was denied. *Id.* at 148. Even though the counsel in *Barnes* went further than merely uttering the word "taxes", this Court affirmed the trial court's ruling that a mistrial was not the appropriate remedy:

> "In view of the prompt action of the court in sustaining the objection to the argument, we cannot say that the court's refusal to grant a mistrial was erroneous. The determination of such matters is largely for the trial court. We cannot say here that the court's ruling was an abuse of the discretion which it possesses." *Id.* at 148 (citations omitted).

As in *Barnes*, the trial court here took prompt action in sustaining the objection. The trial court also offered a variety of remedies to Landowners' counsel short of a mistrial,

including a withdrawal or reprimand. The trial court surely did not exceed its discretion, especially since it offered such relief.

Other cases in Missouri support the City's position. In *State, ex rel. State Highway Comm'n. of Missouri v. City of St. Louis*, 575 S.W.2d 712 (Mo.App. 1978), the Highway Commission brought suit for breach of contract against the city and certain of its officials. On appeal, the commission alleged that the trial court erred in allowing the city's counsel to make a closing argument which urged the jury to consider that taxpayers' money was involved. The Court of Appeals held that such statements were not so clearly improper or manifestly prejudicial that the trial court abused its discretion by allowing the argument. *Id.* at 724-725. It was also emphasized that the remarks merely repeated facts which the jury already knew.[30]

Likewise, in *Polizzi v. Nedrow*, 247 S.W.2d 809, 811 (Mo. 1952), this Court held that, although statements in defense counsel's closing argument were an appeal to jurors as taxpaying citizens, the argument did not compel a finding that the plaintiff was prejudiced.

Courts from other jurisdictions have also found that statements of counsel in condemnation cases regarding the jurors' status as taxpayers are not improper or grounds for a new trial. The statements in those cases involved a direct appeal for the jury to reduce the award based upon their taxpayer status. Nevertheless, the courts refused to grant new trials or reverse the jury verdicts, often on the grounds that the statements were not prejudicial since the jury was already aware of their status as taxpayers.

[30] In this case, the trial judge made the same observation (TR 127).

For instance, in *Utah State Rd. Comm'n. v. Marriott*, 444 P.2d 57 (Utah 1968), the condemnor's counsel argued in his closing argument that it would be unjust to award a windfall at the expense of the public purse and stated: "You people are taxpayers, all of us in this courtroom are taxpayers." *Id.* at 58. The Utah Supreme Court refused to reverse the verdict because the jurors were presumed to be aware that public improvements are financed by tax dollars:

> "It would be unrealistic in the extreme to believe that jurors are so naïve that they do not know that the money to condemn property and construct highways comes from taxes; and that they are taxpayers. We think the safe and proper assumption, necessary in the jury system, is that jurors have average intelligence and knowledge of the ordinary affairs of life . . ." *Id.* p. 58-59.

See also, Childrens Home, Inc. v. State Highway Bd., 211 A.2d 257 (Vt. 1965) (error associated with testimony from employee of State Highway Board that payment for lands taken in condemnation case was from the state treasury and was harmless because the jury was already aware of that fact). Statements by the condemnor's counsel during closing argument urging the jury to consider the case from a personal point of view as taxpayers were held not to be so prejudicial as to constitute reversible error in *Irwin v. State of Alabama*, 200 S.2d 465 (Ala. 1967), *Okon v. State of Texas*, 291 S.W.2d 486 (Tex.App. 1965) and *People ex rel. Department of Public Works v. Graziadio*, 231 Cal. App. 2d 525 (Cal.App. 1964).

Landowners cite two other cases in support of their contention that the trial court was obliged to declare a mistrial. An evaluation of those two cases quickly shows that neither case supports a mistrial and both are plainly distinguishable.

Huggins v. City of Hannibal, 280 S.W. 74 (Mo.App. 1926) is a slip and fall case. The plaintiff claimed that the City of Hannibal negligently maintained a crosswalk. Counsel for Hannibal argued to the jury "to the effect that the taxpayers of the City of Hannibal would have to go into their pockets and pay the plaintiff any award or judgment that might be rendered in her favor, and that any verdict rendered by the jury would be taking the taxpayers' money…" *Id.* at 75. The trial court overruled the plaintiff's objection and stated to the jury that such an argument was proper. The Court of Appeals held that the trial court should have sustained the objection and that the "only proper remedy" was to rebuke counsel and direct the jury that they should not consider such a statement.

Obviously, *Huggins* is distinguishable. In this case, the reference to "taxes" was made during an incomplete voir dire question and never again, whereas the statement in *Huggins* was made in closing argument and was far more explicit in its intent. More importantly, the trial court here did not lend its approval to the statement about taxes. Instead it sustained the objection and required that counsel for the City avoid any further reference to that topic. The trial court also invited the Landowner's counsel to fashion some other remedy if they desired. (Tr. 127-130).

The other case cited by Landowners is *Jones v. Kansas City,* 76 S.W.2d 340 (Mo. 1934). This is a case for personal injuries sustained by the plaintiff when she fell on a

sidewalk. Taxes became a central issue from the outset. During voir dire, a venireman asked plaintiff's counsel if the verdict would increase his taxes. *Id.* at 341. Later, during closing argument, counsel for plaintiff stated that the jury should return a verdict "as a lesson to the city for the prevention of similar accidents in the future and for the saving of taxes by such prevention…". *Id.* at 341. Counsel for defendant Kansas City, Missouri stated in closing argument that "During the next five or six weeks, fifty or sixty people a day will fall on sidewalks and that if the jury allows a recovery in this type of case, God help the city." *Id.* at 341. The trial court held that the argument by the city's attorney was prejudicial and granted a new trial.

That case is not helpful to the Landowners. One important distinction is that in *Jones* the trial court did exercise its discretion to grant a mistrial. Here, the trial court exercised its discretion to deny a new trial. In this case, the issue of taxes was referenced only one time during voir dire, and the reference was incomplete. In contrast to the arguments made by the city's counsel in *Jones*, no one here urged the jury to reduce the award based upon their status as taxpayers. To the contrary, the City's counsel aimed to insure that no one on the voir dire panel would be influenced or prejudiced by the belief that their taxes had been, or may be, increased as a result of their decision.

In cases such as this, the tax issue does not cut only against the Landowners. The nature of the tax made its impact specific, and the City had the right to know if a potential

juror was, or could be, prejudiced by that impact.[31] This was hardly an inflammatory plea designed to incite the passions of the jury. Moreover, the Court promptly sustained Landowners' objection to the question, and those issues were never again mentioned during the five days of testimony that followed, or during closing argument.

The cases point out that the remedy which is offered or requested is a consideration in the matter of a mistrial. One remedy for the Landowners (and the City) would have been to tell the voir dire panel that unless they were staying in a motel or hotel in Springfield, they would not see any impact at all from the project.

C. Reference to "commissioners".

During voir dire the City's counsel made comments concerning the condemnation process as a prelude to questions about the voir dire panel's experiences with such proceedings. The Landowners believe that the trial court erred in failing to grant a mistrial because those comments included a reference to the commissioners. The statements of City's counsel (found at Tr. 99-100) were:

> **Mr. Cowherd**: Let me explain a little bit more about the way the process works. If a public buyee(sic) needs something, and this could be a road, or it could be a park, and they, for the public good, a decision is made that we want to do this. Then in order to do that they've got to get the

[31] See *State of Missouri v Brown*, 547 S.W.2d 797, 799 (Mo. 1977) (counsel should have wide latitude to expose bias); *Ashcroft v. Tad Resources Int'l.*, 972 S. W. 2d 502, 505 (Mo.App.W.D. 1998) (fundamental purpose of voir dire is to expose bias which could form basis for challenge for cause).

property together to put that on the map. And they go out and they try to buy the property.

If there's a property owner that's involved in this project that says I don't want to sell, and that property owner may say I don't want to sell because he's greedy, he wants to up the price because he knows they need to come through his property; or that property owner may want to say I don't want to sell because I've lived on this farm for five year, or twenty years, or thirty years, I just don't want to sell.

Well, nonetheless, the Constitution of the State of Missouri, the City Charter in Springfield says the City, or the County, or the State has a right to take that property so that that project for the public good can proceed.

Now there are safeguards in place. Before the condemnation proceeding can be filed, there has to be an attempt at negotiations to buy the property willingly. And if that fails, then the suit is filed, commissioners decide --

Mr. J. Wallach: Your Honor, I'm going to object to the presentation of this information. It's not pertinent to the selection of the jury.

Counsel for the parties approached the bench and the trial court sustained the Landowners objection. It then directed the City's counsel to make no further remarks about the commissioners (Tr. 107), and none were made thereafter.

The comments of City's counsel were entirely true and were designed to inform the voir dire panel about the condemnation process as a lead-in to questions about what the panel members knew about that process from their own experiences or the experiences of others, and to determine what they may have read or heard about this case. No mention was made at the time (or throughout the remainder of the trial) about the fact that an award had been made by commissioners, or the amount of the award. There was also no suggestion that the Landowners had been the cause for the proceedings or that the value the commissioners had placed on the property was reasonable.

This case received a great deal of attention from the local press both prior to and during the trial. At least 15 of the veniremen had indicated in response to earlier questions during voir dire that they had read or heard about the case through the media. (Tr. 40-67). The amount of the commissioner's award was mentioned in newspaper articles and television reports virtually every day immediately prior to commencement of the trial.[32] It was certainly proper for the City's counsel to attempt to ascertain what the panel had heard about the commissioners' award and whether they could or would be influenced by their prior knowledge.

Moreover, it was clear that some on the venire panel had been influenced by a prior experience with condemnation actions. During Landowners' voir dire examination, several on the panel emphatically expressed distaste and dissatisfaction towards the condemnation process generally and with the powers of condemnation authorized by the Constitution for governmental entities. (Tr. 45, 48, 57-61). Counsel

[32] There was also media coverage during the trial. (Tr. 244-245).

for the City had a responsibility to try to identify the basis for that dissatisfaction and to find out if that belief would prejudice or influence any members of the panel.

Clearly, Missouri Courts have been concerned that disclosure of the commissioners' award could influence jurors. In response to that concern Missouri Courts have generally held that the **amount** of the commissioners' award is not admissible at trial. *State, ex rel. State Highway Comm'n. of Missouri v. Sharp*, 62 S.W.2d 928, 929 (Mo.App. 1933). The obvious suspicion is that knowledge of the prior assessment will influence the jury in reaching their own determination of damages. *Id. at 929.*

The lone case cited by the Landowners simply affirms the prohibition against disclosing the **amount** of the commissioners' award. *Kansas City v. Peret*, 574 S.W.2d 443 (Mo. App. 1978) Counsel for the City have found no cases (and Landowners cite none) in which it was held that the mere mention of the commissioners is cause for a mistrial.

There was more than the mere mention of the commissioners in *State ex rel. Missouri Highway & Transp. Comm'n. v. Williams*, 690 S.W.2d 836 (Mo.App.E.D. 1985). The attorney for the Highway Commission in that condemnation action asked a question of the landowner which included a statement about the fact that commissioners had been appointed by the court to determine damages. The landowner's attorney objected and requested a mistrial, which the trial court refused. The trial court did, however, instruct the attorney for the Highway Commission to avoid any other reference to commissioners. The attorney for the Highway Commission made no further mention

of commissioners, but in a later question to the landowner asked if the state had not, in fact, condemned the property and taken ownership after paying damages for the taking. The trial court again refused a request for mistrial, but instructed the attorney for the Highway Commission to correct the misunderstanding by telling the jury that he did not mean to imply that the landowners had been paid for his property or received compensation from the state. The court declared that the mere mention of the commissioners and pre-trial efforts to purchase the property was not a basis for a new trial, stating:

> "Appellants cited no authority holding that a jury is prejudiced merely by hearing that a government agency has made some effort to determine the worth of land taken for public use. Appellants requested no remedy but a mistrial. The trial court did not abuse his discretion in failing to grant appellant's request." *Id.* p. 838.

Counsel for the City made the comment about commissioners as a lead-in to questions about the knowledge potential jurors had about condemnation. It is often necessary to provide prospective jurors with some information about the proceedings so that the knowledge, beliefs and opinions of prospective jurors can be examined. Similarly, in *State of Missouri, ex rel. State Highway Comm'n. of Missouri v. Select Properties, Inc.*, 612 S.W.2d 866, 870 (Mo.App. 1981), the court found that it was not improper in an opening statement for the attorney for the highway commission to tell the jury panel that before condemnation proceedings start, the highway commission makes appraisals and an offer is made to the landowner:

> "The purpose of an opening statement is to inform the judge and the jury in a general way the nature of the case so as to enable them to understand and appreciate the significance of the evidence as it is presented. Plaintiff's attorney was obviously attempting to supply the jury with background information from which they could better understand their role in the condemnation process. The suggestive overtones alleged by the defendant are not present." *Id.* at 870 (citations omitted).

Indeed, Missouri courts have refused to grant a mistrial in a personal injury case where, during voir dire, plaintiff's counsel improperly inserted the word "insurance" into the name of the company that provided liability insurance coverage for the defendant. See *Hulahan v. Sheehan*, 522 S.W.2d 134 (Mo.App. 1975). If the unauthorized mention of insurance in a personal injury case is not in and of itself grounds for a mistrial, why should the mere mention of "commissioners" cause a mistrial in this proceeding?

Clearly, Missouri cases have not prohibited the mere reference to the appointment of commissioners, nor is there any logical reason for such a rule. No prejudice to either party results from disclosure of that information if the amount of the commissioners' award is not revealed. Any individual familiar with the condemnation process in Missouri is already aware that commissioners are appointed prior to the jury trial. In fact, several of the veniremen on this panel had personal experience with condemnation proceedings. (Tr. 45, 48, 57-61).

The Landowners also contend that the mention of the commissioners violated the City's own motion in limine. But the City's first motion in limine did not go as far as the Landowners allege. It provided for the exclusion of the following:

> "3. Any and all evidence, testimony or mention regarding the commissioners' award." (LF 60).

Reference to the existence of commissioners and the steps of a condemnation proceeding did not violate the trial court's order, which was only designed to preclude disclosure of the specific amount awarded in this case.

The Landowners are also mistaken when they argue that the mention of commissioner and the condemnation process was intended to paint the Landowners as "greedy and as protracting the process through a jury trial in order to get more money." Such a view of the comments is misplaced. The statements of counsel for the City did imply that the parties had not reached an agreement before trial, a fact which, in addition to being obvious, cuts as much (or more) against the City as it does the Landowners. The City's counsel pointed out that there are a variety of reasons why the parties in a condemnation action may not be able to reach agreement. City's counsel never once indicated or inferred that Landowners had been greedy during prior negotiations. The statements made by City's counsel were balanced and properly led to a discussion on the beliefs of the panel about the subject of condemnation. Nothing in those comments were improper or prejudicial.

D. Conclusion.

Neither of the incomplete comments occurring in voir dire can be said to have prejudiced the Landowners, and the trial court cannot be faulted for exercising its discretion to deny a mistrial. For all these reasons, City respectfully requests this Court deny Point II.

POINT III

The trial court did not err in permitting the City to elicit testimony from Earl Newman about traffic counts because the testimony was not opinion evidence which required scientific, technical, or other specialized knowledge, but was in the nature of a records custodian. The City was therefore not required to disclose Earl Newman as an expert witness prior to trial.

A. Standard of Review.

This point is reviewed for abuse of discretion. *Wilkerson v. Prelutsky*, 943 S.W.2d 643, 647-48 (Mo. banc 1997) (The trial court has broad discretion over exclusion of testimony based on non-disclosure during discovery). "Judicial discretion is abused when the trial court's ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *Id.* at 648 (citations omitted).

B. Earl Newman Was Not Testifying As An Expert.

Earl Newman was the traffic engineer for the City of Springfield and was called to establish the foundation for certain traffic count records which were maintained by the City of Springfield. A fair reading of Mr. Newman's testimony found at Tr. 1055-1056,

clearly indicates that he was called for that limited purpose. Two exhibits (Ptf. Exs. 48 and 49) were introduced through Mr. Newman's testimony and came in without objection by Landowners' counsel. Landowners argue that because Mr. Newman holds several degrees in engineering and is registered with the state of Missouri as a professional engineer, he necessarily provided expert testimony. What Landowners forget is the context of Mr. Newman's testimony. While it is true that Mr. Newman's credentials are impressive, his skill and expertise was not required or called upon during his testimony.

The foundation for admission of business records may be laid by any witness with knowledge of the business operation and its methods of record keeping. *See Hautly Cheese Co. v. Wine Brokers, Inc.*, 706 S.W.2d 920, 922 (Mo.App. 1986). The person who made the record or entry in question need not be called as a witness, even if available. *See Rossomanno v. Laclede Cab Co.*, 328 S.W.2d 677, 681-682 (Mo. 1959).

An expert witness is a person possessing particular knowledge and skill. *Bynote v. National Super Mkts., Inc.* 891 S.W.2d 117, 125, (Mo. banc 1995). In *Lazzari v. Dir. of Revenue*, 851 S.W.2d 68, 70 (Mo.App.E.D. 1993), the Court of Appeals held that even though a witness possesses special skill and knowledge, he does not necessarily give expert testimony:

> "[e]ven if some of the witness testimony incidentally calls upon his learning and experience, that does not automatically make him an expert witness."

The testimony proffered by Mr. Newman was clearly in his role as a records custodian and not that of an expert.

Even if Mr. Newman was considered an expert, the Landowners were not prejudiced by his testimony. The trial court gave them ample opportunity to interview him prior to his testimony, to take his deposition if they so desired (Tr. 1037), and afforded them the opportunity to bring in their own rebuttal expert, if necessary. (Tr. 1048). Landowners' counsel availed themselves of the opportunity to informally interview Mr. Newman, but elected not to take his deposition. (Tr. 1048). Judge Holden then precluded any attempt at offering expert testimony through Mr. Newman. (Tr. 1063-1064). That remedy was entirely appropriate and well in line with Missouri law. See *Sanders v. Hartville Milling Co.*, 14 S.W.3d 188, 211 (Mo.App.S.D. 2000) and *Ellis v. Union Elec. Co.*, 729 S.W.2d 71, 75 (Mo.App.E.D. 1987). It should also be noted that Landowners never once sought to provide any sort of rebuttal testimony about the traffic counts contained in the exhibits which were authenticated by Mr. Newman.

The trial court did not abuse its discretion in allowing Earl Newman to testify about traffic counts. The point raised in Landowners' brief should be denied.

POINT IV

The trial court did not err in permitting Fred Wagner to testify regarding traffic counts and trends in the relocation of automobile dealerships because this testimony was the personal observation of a long time Springfield, Missouri, resident and did not rise to the level of an expert opinion, it was cumulative to other evidence and, in any event, Mr. Wagner's report disclosed his knowledge and opinions on those subjects.

A. Standard of Review.

The standard of review on this point is abuse of discretion. "Judicial discretion is abused when the trial court's ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *Wilkerson v. Prelutsky*, 943 S.W.2d 643, 648 (Mo. banc 1997) (citations omitted).

B. The Landowners have waived any objection to the testimony of Mr. Wagner.

The Landowners have complained about the testimony of Mr. Fred Wagner appearing at Tr. 1341-1347. Most of that portion of the Transcript is consumed by discussions between the trial judge and counsel regarding Mr. Wagner's testimony. Boiled down to its essence, the Landowners' complaint has to do with three specific questions and answers. To allow the Court to understand the gravity of the complaint lodged by the Landowners, the City will set forth each of the questions and answers at issue, together with the pertinent questions which preceded the objection of Landowners' counsel, beginning at Tr. 1340:

Question: Now sir you have been in this community a good long while. Is that true?

Answer: Correct.

Question: And you have noticed a change in the way that, or at least, the location of car sales facilities in this community over those years?

Answer: Yes, obviously.

Question: What have you noticed about that?

Answer: Well, everyone's moved south, primarily.

Question: Do those maps indicate this trend that you are talking about between 1970 and current?

Answer: Can I look at them?

Question: Sure.

Answer: Yes.

Question: How do you explain that? Why is that happening?

Answer: Just the growth of Springfield to south and east. The highest traffic volumes are on the main arteries as opposed to downtown, where they were originally many years ago. St. Louis, I think, at one time, most of the dealers were downtown. And I bought cars from Don Wessell in '70 when he opened. And at that time they were all downtown grouped together, but since, they have moved out.

(Discussion of counsel with the Court).

Question: Sir the fact that dealers are now located on the south and east part of town, would that be a secret to any buyer that would be interested - -

J. Wallach: Objection, your honor.

Court: Sustained.

Question: Is that obvious to anyone?

J. Wallach: Objection. That's the same question.

Court: Sustained.

Question: So you have noticed this trend, correct?

Answer: Correct.

* * *

Question: Is that something you considered in your evaluation of this property of the Thompson?

J. Wallach: Objection, your honor, for the reasons I've discussed.

Court: I'm thinking. It's a yes or no answer. I'll overrule it. At this point, I want to hear the yes or no and then we'll go from there.

Answer: Yes, I certainly did.

From that point, the testimony of Mr. Wagner moves to a different topic. (Tr. 1347).

It is clear that Mr. Wagner was merely referring to his own observation and to the previous exhibits which had been admitted in the case showing the relocation of auto dealerships from the downtown portion of Springfield to outlying areas (Ptf. Exs. 1A, 2A, 3A, 4A and 5A). The sum and substance of the Landowners' complaint is that Mr. Wagner testified that he had observed the relocation of dealers to outlying portions of Springfield and he considered that fact in his evaluation of the property.

The City first notes that the Landowners have preserved nothing for review by this Court. Although counsel for the Landowners approached the Court and complained that

Mr. Wagner was being asked to testify about things beyond the scope of his previous testimony in deposition (Tr. 1341-1345), Landowners did not request that the testimony given by Mr. Wagner prior to the objection be stricken to preserve a claim for error. The failure to request the trial court to strike testimony which has been received, but which a party believes to be improper, results in a waiver of that complaint. *See Keith v. Burlington N. RR Co.*, 889 S.W.2d 911, 921-922 (Mo.App.S.D. 1994) and *Concord Publishing House, Inc. v. Director of Revenue, State of Mo.*, 916 S.W.2d 186, 185 (Mo. banc 1996).

C. Mr. Wagner's testimony was cumulative and not prejudicial.

Even if the Landowners have preserved their objection to the testimony of Mr. Wagner, that testimony could not be prejudicial to the Landowners, nor do Landowners claim that it is.

The subject of traffic counts was squarely placed before the jury during the testimony of Mr. Cologna. (Tr. 1052) and Mr. Newman. (Tr. 1055-1071). During the testimony of Mr. Noe, the Court admitted into evidence Ptf. Exs. 1A, 2A, 3A and 4A, all of which related to relocation of dealers from the downtown area to outlying areas. (Tr. 1077-1080). During the cross-examination of Mr. Lynn Thompson, a map showing the current locations of dealers within the Springfield area was admitted. (Tr. 548; Ptf. Ex. 5A). Mr. Willis, the City's other valuation expert, testified that he had observed the migration of car dealers from the downtown area. (Tr. 1179). Mr. Ben Hicks was asked about the significance of a former automobile facility located near the intersection of

Glenstone Avenue and Chestnut Expressway in Springfield, and the fact that it had been vacant for at least five years. His statement was:

> "It's basically saying that the dealers are wanting to move out into the suburbs and get away from the downtown area where there is more traffic flow. Again, that what it all comes down to." (SLF 017 – Page 18, Line 5).

The testimony of those earlier witnesses made Mr. Wagner's testimony merely cumulative. As such, it could not be prejudicial to the Landowners[33]. It is evident from the discussion between counsel and the trial judge and the subsequent rulings on objections that the judge limited the scope of Mr. Wagner's testimony. The judge cannot be convicted for his judicious approach to Landowners' objections and certainly did not abuse his discretion. See *Sanders v. Hartville Milling Co.*, 14 S.W.3d 188, 211 (Mo.App.S.D. 2000).

D. Mr. Wagner's testimony had been fully disclosed.

Finally, the assertion by counsel for the Landowners that Mr. Wagner was testifying about matters not contained either in his deposition or in his preliminary or final appraisal report is simply wrong. The City is attaching excerpts from the final appraisal report presented by Mr. Wagner prior to trial. See Appendix G (pps. A024-A026). At page 10 of his report (Appendix G, p. 025), Mr. Wagner stated:

> "Subject's neighborhood is in a stability stage with some revitalization, values have been stable in recent years. The presence of the government

[33] *See Porter v. Erickson Transp. Corp.*, 851 S.W.2d 725, 740-741 (Mo.App.S.D. 1993) and *City of Rolla v. Armaly*, 985 S.W.2d 419, 424 (Mo.App.S.D. 1999).

offices, and University Plaza Trade Center acts as a stabilizing force for the neighborhood, but not automotive new car dealerships, which have all moved south over the past ten to twenty years except for Thompsons." (Emphasis supplied).

Again, on page 33 of his report (Appendix G, p. 026) in reference to his analysis of the Douglas Toyota transaction (the property located at the corner of Sunshine and Highway 65), Mr. Wagner states:

"Sale No. 2 is located at the northeast quadrant of the highest traffic count interchange in Springfield, Missouri. This location has such a high traffic count that the outer roads, Eastgate and Ingram Mill, are being relocated now, with a new interchange proposed within five years."

Obviously, the Landowners were placed on notice that Mr. Wagner had considered both traffic counts and the relocation of car dealerships from downtown Springfield in his evaluation of the property.

For the foregoing reasons, Point IV raised by the Landowners in their brief should be denied.

POINT V

The trial court did not err in permitting the City to show the videotaped deposition of Ben Hicks because it was not an abuse of discretion to permit testimony by videotape when juror questioning was allowed during the trial.

A. Standard of Review.

The trial court has substantial discretion on the admissibility of testimony, and its ruling will not be disturbed on appeal absent an abuse of discretion. *Doe v. Alpha Therapeutic Corp.*, 3 S.W.3d 404, 421 (Mo.App. 1999).

B. Videotape Testimony Precludes Jury Questioning.

First and foremost, the Landowners have not cited any Missouri cases or cases from any other jurisdiction that would indicate that jury questioning should not be allowed in the event that any witness appears by deposition. As the Court is aware, most trials today necessarily have testimony by witnesses who appear either by deposition or by videotape deposition. If a rule is crafted that all witnesses must testify in person to have juror questioning, the ultimate effect of that ruling would be to eliminate juror questioning. A very foreseeable problem with the Landowners' argument could arise in a lengthy trial where the parties intend to call all witnesses live at trial and for that reason jury questioning is allowed. If a witness then becomes unavailable and must testify by deposition, under the Landowners' scenario, the judge would be forced to grant a mistrial.

The Landowners point to no specific prejudice that arose as a result of the jury members not being able to question Mr. Hicks. When this issue was addressed to the trial judge, he indicated his belief that the inability of the jury members to question Mr. Hicks would be more of a detriment to the City. (Tr. 217). This certainly is logical and Landowners' counsel even conceded that it could be a detriment to the City and be a benefit to Landowners. (Tr. 236). Any claim of prejudice is necessarily speculative

because there was no indication in the record of what questions, if any, the jury would have asked. In fact, the jury did not ask any questions of one witness, Mr. Cologna. (Tr. 1052). Landowners have the burden to show prejudice from this alleged error. *See McMullin v. Borgers*, 806 S.W.2d 724, 731 (Mo.App.E.D. 1991).

In order for this Court to determine that allowing the deposition testimony of Mr. Hicks was an abuse of discretion, it must find that this particular situation was "so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration". *See Wilkerson v. Prelutsky*, 943 S.W.2d 643, 648 (Mo. banc 1997). This issue clearly does not rise to the level of an abuse of discretion, and for that reason, this point should be denied.

POINT VI

The trial court did not err in denying Landowners' motion for new trial because the foregoing incidents referred to by Landowners do not constitute error, did not have a cumulative, prejudicial effect, and therefore an accumulation of non-erroneous incidents cannot result in error.

A. Standard of Review.

The standard of review on this point is abuse of discretion. "Judicial discretion is abused when the trial court's ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *Wilkerson v. Prelutsky*, 943 S.W.2d 643, 648 (Mo. banc 1997) (citations omitted).

B. This Court should not reverse and remand because the accumulation of non-erroneous incidents cannot result in error.

An appellate court should not order a new trial "[w]here various incidents referred to do not constitute error, an accumulation of non-erroneous incidents cannot result in error." *Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 853, 871 (Mo. banc 1993). This rule of law has long been upheld by the Missouri Supreme Court. In *Baker v. Ford Motor Co.*, 501 S.W.2d 11, 18 (Mo. 1973) the court held that "in as much as no prejudicial error has been found, there is no necessity for consideration of the cumulative effect of error." *Id.*

The Landowners have failed to raise any prejudicial error as stated in each point above. They rely on *DeLaporte v. Robey Bldg. Supply, Inc.*, 812 S.W.2d 526, 536 (Mo.App.E.D. 1991) for the proposition that an appellate court may order a new trial "due to cumulative error, even without deciding whether any single point would constitute grounds for reversal." *Id* at 536. In *DeLaporte*, a new trial was granted due to errors in the jury instructions. *Id.* at 531. "[C]umulative error was not the reason a new trial was ordered in *DeLaporte*." *Stucker v. Rose*, 949 S.W.2d 235, 239 (Mo.App.S.D. 1997). Further, in the case of *Smith v. Wal-Mart Stores, Inc.*, 967 S.W.2d 198, 205 (Mo.App.E.D. 1998), the court pointed out that there must be a showing of prejudice if in fact there was error:

> "However, we will not grant a party relief due to cumulative error 'when there is no showing that prejudice resulted from any rulings of the trial

court.' We find the errors alleged by defendant either constitute no error or are harmless and do not warrant a new trial. . ." (Citation omitted).

The Landowners' reliance on the *DeLaporte* decision is unfounded.

There were no prejudicial errors in this trial and Landowners were afforded a fair trial to obtain just compensation for their property. Since there were no prejudicial errors, there is no necessity for this Court to consider the cumulative effect of alleged error and should deny this point.

CONCLUSION

It is apparent that the Landowners have failed to identify any errors by the trial court, let alone any errors which were prejudicial to them. Clearly, the jury verdict is within the range of values established by the expert appraisers that testified before the court. The amount awarded by the jury was higher than either of the appraisers testifying on behalf of the City and less than the amount given by each of the appraisers on behalf of the Landowners. Such a result is not surprising, and certainly indicates no prejudice against the Landowners. That fact is amply supported by the statement made in closing argument by the Landowners' counsel when he stated. (Tr. 1515-1516):

> "The evidence would support you all the way over five million dollars. The evidence would support you all the way down to 2.4 which is the cumulative number. That's the spectrum.
>
> **Whatever you do between those numbers, you do, and we will all live with it**." (emphasis added).

The City respectfully submits that the reason why the jury selected the value it did had more to do with the weaknesses within the testimony of the Landowners' appraisal experts than anything else. Mr. Mathewson, for example, testified that he believed that the property had a value of $3,416,000. (Tr. 782-783). Nonetheless, he testified that value of the property based on his cost approach was $2,639,500 (Tr. 797), and based on his income approach was $2,745,000. (Tr. 801). The jury certainly cannot be faulted for considering those disparities and reaching the conclusion that his lower estimates of value were more believable than the higher value. The Landowners' other appraisal expert, Mr. Davis, testified that the land value of the tract fronting on St. Louis Street was $6.40 per square foot (Tr. 903) whereas every other appraiser valued the same land at approximately $3.00 per square foot less. (Tr. 744, 1122 and 1310). The jury may have thought that Mr. Davis was at some disadvantage because he was from Kansas City and lacked familiarity with the Springfield market. Mr. Davis also stated that the indicated value for the Landowners' property based on his comparable sales approach ranged from $2,371,000 to $3,720,000. (Tr. 984). Perhaps the jury believed that the lower value was a better indicator. The jury also may have been unimpressed by the fact that Mr. Davis failed to consider the sale of a new car sales facility located within seven blocks of Landowners' property which took place within a year of the trial. (Tr. 956). No doubt those weaknesses in the Landowners' expert testimony led their counsel to suggest to the jury that any value within the range set by the appraisers would be suitable.

The bottom line is that the Landowners did receive a fair trial, free of any improper influence which adversely influenced the outcome. The jury verdict in this case should, therefore, be affirmed in all respects.

Respectfully submitted,

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IN THE MISSOURI SUPREME COURT

CITY OF SPRINGFIELD, MISSOURI, Respondent,	)	
v.	)	No. SC 83912
THOMPSON SALES COMPANY, et al., Appellants.	)	

CERTIFICATE OF COMPLIANCE WITH RULE 84.06, SPECIAL RULE NO. 1 AND CERTIFICATE OF SERVICE

STATE OF MISSOURI)
) ss.
COUNTY OF GREENE)

Pursuant to Rule 84.06(c) and Special Rule No. 1, counsel for City certifies that this brief complies with the limitations contained therein. There are 20, 048 words in this brief. Counsel for City relied on the word count of his word processing system in making this certification.

Pursuant to said Rules, counsel for City certifies that the disk filed herewith has been scanned for viruses and is virus-free.

Further, counsel for City states that City's brief in the within cause was by him caused to be served, either by Federal Express or by ordinary mail, postage prepaid, in the following stated number of copies, addressed to the following named persons at the addresses shown, all on the 5th day of November, 2001:

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Subscribed and sworn to before me this 5th day of November, 2001.

_____
Notary Public

My commission expires: